Fun Connection and Juice Time; Offi-Serve, Div. of Stuff Like That, Inc.; Capital Vending and Columbia Vendors *and* Bakery, Laundry, Beverage Drivers and Vending Machine Servicemen and Allied Workers Local No. 669, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO. Cases 3–CA–14365–1, 3–CA–14365–2, and 3–CA–14365–3

April 30, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On April 5, 1990, Administrative Law Judge Robert T. Snyder issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.

In its exceptions, the Respondent contends that the bargaining order recommended by the judge is not appropriate based, inter alia, on the turnover among bargaining unit employees since the time of the Respondent's unfair labor practices. The Board has specifically held that ''the validity of a bargaining order depends on an evaluation of the situation as of the time the unfair labor practices were committed.'' See *Highland Plastics*, 256 NLRB 146, 147 (1981). Thus, the evidence presented by the Respondent regarding changes in the composition of the bargaining unit are irrelevant considerations when assessing the propriety of issuing a *Gissel* bargaining order. See, e.g., *Massachusetts Coastal Seafoods*, 293 NLRB 496 (1989); *Salvation Army Residence*, 293 NLRB 944 (1989).

We are cognizant, however, that this case arises in the Second Circuit, in which the court has repeatedly considered this factor relevant to the determination of this issue. See, e.g., *NLRB v. J. Coty Messenger Service*, 763 F.2d 92 (1985); *NLRB v. Marion Rohr Corp.*, 714 F.2d 228 (1983). We therefore shall address the significance of the evidence presented by the Respondent. We find, however, that this evidence would not warrant withholding an otherwise appropriate bargaining order. The Respondent's unfair labor practices were serious and affected the entire unit. The record shows that as of the time of the hearing 5 of the 12 bargaining unit employees employed at the time of the unfair labor practices had left the Respondent's employ for reasons that are not indicated in the record. The remaining seven employees were still employed, however, as well as at least one replacement who was hired at the time of the Respondent's unfair labor practices and reasonably likely to have been aware of the actions taken in response to the employees' attempt to organize. We find that the turnover present in this case would not sufficiently mitigate the inhibitive effects of the Respondent's actions, and that those effects are likely to persist for the reasons set forth by the judge in recommending the issuance of a bargaining order.

ORDER

The National Labor Relations Board orders that the Respondent, Fun Connection and Juice Time; Offi-Serve, Div. of Stuff Like That, Inc.; Capital Vending and Columbia Vendors, Coeymans, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any employees or otherwise discriminating against them in retaliation for engaging in protected strike, work stoppage or other protected activities for their mutual aid or protection.

(b) Interfering with, restraining, or coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act by informing their employees that they would never recognize or deal with a union and that they were discharged for engaging in strike, work stoppage or other protected concerted activities; by interrogating their employees concerning their union or other protected concerted activities; by soliciting grievances from their employees and impliedly and explicitly promising to redress them and institute improvements in terms and conditions of employment, and promising to provide other benefits, including cosigning for an automobile loan, if employees ceased

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's conclusion that the Respondent threatened to discharge and later discharged the striking employees, we rely on the credited testimony of employees Micelli and Macie and Union President Wood concerning the statements made by Peter Mayone Sr. and Peter Mayone Jr. Accordingly, we do not rely on the adverse inference drawn by the judge regarding the Respondent's failure to call employee Dowd as a witness.

We also agree with the judge's conclusion that the Respondent required employees to disavow the Union and withdraw their authorization cards as a condition of employment on their return to work from the strike. In reaching this conclusion, we rely on Macie's credited testimony that, when he attempted to return to work with other employees, Mayone Jr. informed them that they would have to sign a card stating that they did not want the Union anymore. Thus, we find it unnecessary to pass on the judge's determination that employee Colletti acted as an agent of the Respondent in obtaining written disavowals from returning employees.

The Respondent has excepted to the judge's conclusion that the strike that began on May 9, 1988, was converted to an unfair labor practice strike even though the employees had initially intended to strike for recognition. In adopting the judge's conclusion we note, with respect to effect of the Respondent's unfair labor practices in prolonging the strike, that the employees were unlawfully discharged by the Respondent at the inception of the strike.

their support for the Union; by instituting as a condition of employment a requirement that employees sign a statement disavowing the Union and withdrawing their union authorization cards; by directing their employees to produce their NLRB affidavits in the course of preparation for trial, without the specific safeguards required by the Act; and by directing an employee to abstain from contact with the Union or with other employees in order to solicit their support for the Union.

(c) Granting salary increases, increases in contributions to employee health insurance premiums, or other improvements in terms and conditions of employment in order to discourage their employees' support for, activities on behalf of, or membership in a labor organization. Nothing herein, however, shall require Respondents to rescind or withdraw these benefits and improvements granted to employees.

(d) Refusing to recognize and bargain with Bakery, Laundry, Beverage Drivers and Vending Machine Servicemen and Allied Workers Local No. 669, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, as the exclusive representative of the employees in the following appropriate unit:

> All route salesmen, drivers, mechanics and warehousemen employed by Respondents at their facilities located at Ravena and Coeymans, New York, excluding all other employees, guards and supervisors as defined in the Act.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make the employees named below whole for any loss of earnings which they may have suffered by virtue of the discrimination against them by paying them an amount equal to what they would have earned from the date of discharge to the date that they were offered reinstatement. Such backpay is to be computed in the manner set forth in the remedy section of the judge's decision and as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

Malcolm Carter	Mark Racene
Steve Colletti	Rick Sanchez
Ken Cymbalisty	Harold Turk
James Macie	Rick Thrush
Joe Micelli	Robert Wyant

(b) Preserve and, on request, make available to the Board or its agents, for examination and copying, all records, reports, and other documents necessary to analyze the amount of backpay due under the terms of this Order.

(c) Recognize, effective May 9, 1988, and on request, bargain in good faith with Bakery, Laundry, Beverage Drivers and Vending Machine Servicemen and Allied Workers Local No. 669, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, as the exclusive representative of the employees in the appropriate unit and embody in a signed agreement any understanding reached.

(d) Post at its Ravena and Coeymans, New York facilities, copies of the attached notice marked ''Appendix.''[3] Copies of said notice on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge any employees or otherwise discriminate against them in retaliation for engaging in protected strike, work stoppage or other protected activities for their mutual aid or protection.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed in Section 7 of the Act by informing our employees that we would never recognize or deal with a union and that they were discharged for engaging in strike, work stoppage, or other protected concerted activities; by interrogating our employees concerning their union or other protected concerted activities; by soliciting grievances from our employees and impliedly and explicitly promising to redress them and institute improvements in terms and conditions of employment, and promising to provide other benefits including cosigning for an automobile loan if our employees ceased their support for the Union; by instituting as a condition of employment a requirement that employees sign a statement disavowing the Union and withdrawing their union au-

thorization cards; by directing our employees to produce their NLRB affidavits in the course of preparation for trial, without the specific safeguards required by the Act; and by directing an employee to abstain from contact with the Union or with other employees in order to solicit their support for the Union.

WE WILL NOT grant salary increases, increases in contributions to employees health insurance premiums, or other improvements in terms and conditions of employment in order to discourage our employees' support for, activities on behalf of, or membership in a labor organization. Nothing herein, however, shall require us to rescind or withdraw these benefits and improvements we have granted.

WE WILL NOT refuse to recognize and bargain with Bakery, Laundry, Beverage Drivers and Vending Machine Servicemen and Allied Workers Local No. 669, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, as the exclusive representative of our employees in the following appropriate unit:

> All route salesmen, drivers, mechanics and warehousemen employed by Respondents at their facilities located at Ravena and Coeymans, New York, excluding all other employees, guards and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make our employees named below whole for any loss of earnings which they may have suffered by virtue of our discrimination against them by paying them an amount equal to what they would have earned from the date of discharge to the date that they were offered reinstatement, less net interim earnings, plus interest.

Malcolm Carter	Mark Racene
Steve Colletti	Rick Sanchez
Ken Cymbalisty	Harold Turk
James Macie	Rick Thrush
Joe Micelli	Robert Wyant

WE WILL recognize, effective from the date beginning May 9, 1988, and, on request, bargain in good faith with Bakery, Laundry, Beverage Drivers and Vending Machine Servicemen and Allied Workers Local No. 669, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, as the exclusive representative of our employees in the appropriate unit and embody in a signed agreement any understanding reached.

FUN CONNECTION AND JUICE TIME; OFFI-SERVE, DIV. OF STUFF LIKE THAT, INC.; CAPITOL VENDING AND COLUMBIA VENDORS

Alfred M. Norek, Esq., for the General Counsel.
Richard A. Kohn, Esq. (Kohn, Bookstein & Karp, P. C.), of Albany, New York, for the Respondent.
Domenick Tocci, Esq. and *Stephen V. Parker, Esq.*, of Albany, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. These consolidated cases were heard by me in Albany, New York, on January 23 to 26, 1989, on companion unfair labor practice charges filed on May 12, 1988, and a consolidated complaint issued on June 30, 1988. The consolidated complaint alleges that Fun Connection and Juice Time (Juice Time); Offi-Serve, Div. of Stuff Like That, Inc. (Offi-Serve); Capital Vending and Columbia Vendors (Capital Vending); and collectively (Respondent), engaged in a variety of unlawful acts, including the termination of its employees who were then on strike in support of a demand for recognition of the Union[1] as their collective-bargaining representatives, adamant refusal to recognize or deal with the Union, interrogation of its employees concerning their union activities, solicitation of grievances and promises to redress them and to improve benefits, and conditioning the striking employees' return to employment on their disavowal of the Union, and withdrawal of their union authorization cards, in violation of Section 8(a)(1), (3), and (5) of the Act. The complaint further alleges granting of a salary increase or increase in the Respondent's contribution to health insurance premium at the employee's option and directing an employee to cease his union activity, and to produce his NLRB statement without providing the required assurances against reprisals and that production was voluntary, in violation of Section 8(a)(1) of the Act. During the hearing, by motion, the General Counsel further amended the complaint to alleged Respondent's promise to an employee to cosign for an automobile loan in order to induce his return to work and abandonment of the strike and Respondent's grant of other improvements in terms and conditions of employment in order to discourage its employee's support for and activities on behalf of the Union in violation of Section 8(a)(1) of the Act. The General Counsel also alleges that the strike was prolonged by various of the unfair labor practices of Respondent described. Among other remedies, the General Counsel seeks a bargaining order grounded on the claim that Respondent's conduct, intended to undermine the Union and destroy its majority status in the ap-

[1] International union affiliation added to name of the Charging Party by motion granted during hearing.

propriate units alleged[2] tended to interfere with the election process and to preclude the holding of a fair election.

Respondent filed answer denying the conclusionary allegations of violations of the Act alleged in the consolidated complaint. During the hearing, Respondent denied the amendments to the complaint alleging further violations of the Act described above.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. The General Counsel and Respondent have each filed posttrial briefs which have been carefully considered. On the entire record in the case including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Juice Time, a partnership consisting of Peter Mayone Sr. (Mayone or Mayone Sr.), and Peter Mayone Jr. (Mayone Jr.), organized under the laws of the State of New York, with its principal office located at a warehouse at South Main Street in Coeymans, New York (the warehouse or Coeymans facility) and a facility located at 152 Main Street, Ravena, New York (the Ravena facility), has been at all times material, engaged in the retail and nonretail sale and distribution of canned and bottled juices. Fun Connection, a related business entity, is engaged in the distribution of video games. Annually, in the course of its business operations, Juice Time derives gross revenues in excess of $500,000 and purchases and receives at the Ravena facility goods and materials valued in excess of $50,000, which are shipped directly from points located outside the State of New York. Offi-Serve, a New York corporation, with its principal office and place of business located at the Ravena facility has been at all times material engaged in servicing of coffee machines, water coolers, and soda machines and the retail and nonretail sale of soda, coffee, and water. Annually, in the course of its business operations, Offi-Serve derives gross revenues in excess of $500,000 and purchases and receives goods and materials at the Ravena facility valued in excess of $50,000 which are shipped directly from points located outside the State of New York. Capital Vending, a partnership organized under the laws of the State of New York with its principal office and place of business located at the Ravena facility has been at all times material engaged in the retail and nonretail sale of soda, candy, snacks, cigarettes, and related products through vending machines. Annually, in the course of its business operations, Capital Vending derives gross revenues in excess of $500,000 and purchases and receives at the Ravena facility goods and materials valued in excess of $50,000 which are shipped directly from points located outside the State of New York. Respondent admits, and I find, that Juice Time, Offi-Serve, and Capital Vending are each an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At the outset of the hearing, the parties stipulated that Juice Time, Offi-Serve, and Capital Vending collectively constitute a single employer under the Act. In their answer Juice Time, Offi-Serve, and Capital Vending admitted that Mayone is their chief operating officer, a partner in Juice Time and Capital Vending and an officer and sole shareholder of Offi-Serve, that their employees share certain terms and conditions of employment, that Juice Time and Offi-Serve share certain warehouse premises and that all three employees share certain premises as business offices. By virtue of the foregoing stipulations and these facts. I also find that Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

The consolidated complaint also alleges, Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Respondent's Work Force at the Beginning of May 1988*

As of May 9, 1988,[3] Respondent employed 18 employees, excluding Mayone. Three, Rick Sanchez, Malcolm Carter, and Joseph Micelli, were drivers for Juice Time who delivered juice: Sanchez, as a route driver filling vending machines and Carter and Micelli delivering juice to institutional schools. Carter and Micelli received one-time commissions for obtaining new customer accounts for juice deliveries. Juice Time also employed a bookkeeper, Kelly Millett, who worked at a desk at the Ravena facility. The drivers handed in their paper work showing route collections, deliveries, and the like to Millett on a daily basis. The Juice Time drivers were supervised by Grant Lewis, sales manager, who set up and assigned their daily work schedules based on his business judgment. Lewis, who worked a regular 8 a.m. to 5 p.m. day in contrast to the drivers who work either 7 a.m. to 3:30 p.m. or 8 a.m. to 4:30 p.m., had authority to recommend discipline of the drivers and Mayone relied on his recommendation. In contrast to the drivers, Lewis regularly received a sales commission averaging $200 per week in addition to his $300 salary based on weekly sales. The drivers received wages ranging between $275 and $325 per week for 40 hours work. Lewis was in charge of day-to-day operations of Juice Time and reported to Mayone daily to discuss operations. Lewis also assigned drivers to duties with the other entities after consultation with Mayone and adjusted routes to cover for vacations. Mayone's son, Mayone Jr., partner with his father of Juice Time, and in charge of the Fun Connection operation, testified that he and Lewis had similar responsibilities in running their respective entities. The parties also stipulated that Mayone Jr. was a supervisor within the meaning of the Act.

On May 9, Offi-Serve employed four drivers who serviced accounts and distributed coffee burner units, coffee, and related supplies, soda for vending machines and Deer Park water. They were Richard Thrush, Mark Racine, Steve Wilkins, and Steve Colletti. Wilkins and Colletti solicited new accounts receiving one-time commissions if successful. Offi-Serve also employed a bookkeeper, Karen Libertucci, who worked at a desk located at the Ravena facility. Wilkins and Colletti used desks in the same area at the same facility to solicit amounts and do their paperwork before and after

[2] By motion made during hearing, the General Counsel alleges an alternate overall unit as appropriate for bargaining and the preferred unit for imposition of the bargaining remedy.

[3] All dates shall refer to 1988 unless otherwise noted.

going out on the road in their trucks. Offi-Serve and Capital Vending also employed a repairman, Jeff Dowd, who worked in the shop in the service department at the Ravena facility on the two and three burner coffee units supplied to customers by Offi-Serve as well as at customer locations repairing the vending machines installed at Capital Vending customer premises. Dowd was paid $175 per week by Offi-Serve and $200 per week by Capital Vending. Capital Vending also employed five drivers, who serviced vending machines with juice, one of whom, Wilkins, also did deliveries for Offi-Serve. The four others were Harold Turk, Bob Wyant, Kenny Cymbalisty, and Jim Macie. They loaded their trucks on a daily basis with juice warehoused at the Coeymans' facility. Respondent employed no separate warehousemen. The drivers and repairman Dowd had work contact daily as the drivers reported to him repairs or replacement parts needed on the equipment. Other Capital Vending employees were Mayone Jr., supervisor; Janice Ingram, bookkeeper and typist; and Bruno Giacomini, a utility person who cleaned the Ravena facility, ordered the coin wrappers, and made daily deposits of the coins in Respondent's bank accounts. As of May 9, Giacomini worked approximately 20 hours per week, at an hourly rate of $3.75, starting at 6 a.m., vacuuming and cleaning the premises, making coffee, and then at 9 a.m. depositing coins in two accounts maintained at two separate banks in town. He had no contact with the drivers.

Up to 2 to 3 weeks prior to May 9, and then starting in mid-May and thereafter, Respondent employed a counter or cashier, who worked from 8 a.m. to 2:30 p.m., machine separating and wrapping the coins collected from vending machines by Capital Vending drivers in a separate, closed room. The counter had no contact with the drivers and did not check collections of coins for accuracy against submitted invoices.

During the hearing, the parties stipulated that an appropriate bargaining unit at the Respondent's place of business alleged in the complaint would include the following classifications: Driver/servicemen, vending machine mechanics, and plant clerical employees. The Respondent also took the position that in addition to the classifications described, the utility (or maintenance) position currently held by Giacomini would be included in the stipulated unit. With that addition, it was agreed by the parties that the unit consisted of no more than 17 employees. The Union and the General Counsel dispute the inclusion of the maintenance position on the ground it does not share a community of interest with the drivers and would, accordingly, limit the unit to 16, including the bookkeepers. Other differences as to appropriate unit concern placement of Grant Lewis, the supervisor, the bookkeepers, and the cashier and will be discussed in the analysis portion of this decision.[4]

[4] Lester testified that the reason he included the utility classification in his demand letter to Respondent was that based on his experience in the industry with other employers under collective-bargaining relationship with the Union, utility men, unlike Giacomini, service machines, perform warehouse duties, light mechanical work, and fill in as a driver on routes, just as some of the route drivers did. Lester also noted that he included the cashier classification because at the union meetings, it was represented to him by Steve Benjamin, the cashier who involuntarily left Respondents employ prior to the strike, that he also went on the road as a vending machine operator up to 2 hours a day. There is no evidence that the cashier subsequently hired by Respondent after the union demand performed similar duties.

At the hearing, I also granted the General Counsel's motion to amend the complaint to allege, alternatively, with respect to the bargaining unit that an overall unit consisting of all route salesmen, drivers, mechanics, cashiers, warehousemen, and utility men employed at the Employer's facilities in Ravena and Coeyman, New York, constitute an appropriate unit under Section 9(b) of the Act. I further granted a second motion to amend the allegations in paragraph XII(a), (b), and (c) to conform to the Union's bargaining demands set forth in the letters that its witnesses testified were hand delivered to the Mayones, father and son, on May 9.[5]

B. *The Union's Organizational Drive*

On April 13, Leo Lester, secretary-treasurer and principal executive officer of the Union met employee Micelli on the road in Albany, and at lunch that day solicited Micelli who signed and returned a combination application for union membership and authorization card and took a dozen blank cards and pamphlets for distribution to other employees. Thereafter, Micelli distributed cards to individual employees who signed in his presence and returned them to him. Micelli obtained cards in this manner on April 18 and 19 from Carter, Colletti, Cymbalisty, and Sanchez. Micelli testified he received an undated card from Wyant on or about April 20 who signed and returned it to him that day. Another card, signed by Thrush and dated April 19, was solicited by Sanchez but returned by Thrush directly to Micelli.

Lester, himself, solicited cards directly from Racine on May 4 and Turk on May 9, aside from the card Micelli signed on his initial organizing approach. Joe Wood, the Union's president, obtained a signed card from Macie dated April 27.

Thus, by May 9, 10 of the 12 rank-and-file route drivers and salesmen mechanics, drivers and warehousemen then employed by Respondent, had signed cards applying for union membership and authorizing the Union to represent them in collective bargaining with their Employer. While Respondent cross-examined witnesses with respect to the circumstances surrounding the signing of some of the cards, and objected in at least two instances, those involving the receipt of Wyant's undated card and of Thrush's card signed by him outside Micelli's presence but handled over by Thrush himself to Micelli, I was satisfied as to the authenticity and the proximate date of execution of these cards among the others which were not attacked, and received them all in evidence. Respondent has not argued at the hearing or in its brief, and, it seems to me, could not legitimately contend that the cards did not represent the signers' designation of the Union to represent them or could not be counted in determining the Union's majority status among these employees, on the date of May 9 that it requested bargaining.

While the card solicitations were underway, the Union held its first organizational meeting on April 27 at the Beaver Lodge in West Athens, New York. Nine employees attended. A second meeting was held on May 4, at Brennan's, a restaurant with bar in Greenville, New York. Again, nine employees attended. At this meeting, Lester and Wood pre-

[5] Par. XII of the consolidated complaint alleges three separate appropriate units, one for each Respondent entity, and each including only driver/servicemen, employed only at the Ravina facility. The units described in these letters appears infra and are identical to the unit composition contained in the alternative overall unit alleged as appropriate.

sented options to employees in pursuing collective-bargaining status with Respondent, among them filing an election petition and/or demanding bargaining, offering the Employer an opportunity to check the Union's majority status as demonstrated by the cards, and, if Respondent refused to recognize and bargain, then striking to secure such status. A vote was taken by the employees to pursue the latter course, and strike, if necessary, on a rejection of the Union's demand. It was agreed that the union agents and employees would meet at the Ravena facility on Monday, May 9, to follow this course of action.

C. *Respondent's Conduct in Alleged Violation of the Act Commencing on May 9*

According to Micelli, on May 9, he reported to the Ravena parking lot, at between 7 and 7:15 a.m. where about five other employees were already waiting in a group, along with Lester and Wood. At this point, Mayone Jr. pulled up to the lot in his car, got out and came over to the group. Lester told him he was from the Union and the men wanted him to represent them. Mayone Jr. looked at the men, shook his head, and said, ''What the hell is going on? All you guys cut the crap and go back to work.'' When no one left the assembled group, he got back in his car and drove off to another area to park and go in to the office. By this time, the remaining respondent route drivers had arrived and were congregated in one area of the lot. About 15 minutes later, Mayone Sr. pulled up, got out of his car and asked what was going on. Lester went up to him, extended his hand and introduced himself. After Lester identified himself as being from Local 669 and seeking recognition of the Union on behalf of the men, Mayone Sr. pulled his arm back. Lester handed him some papers, later identified as being demand letters and recognition agreements. Mayone Sr. took them, and said, ''As long as I own this business, there ain't going to be no goddamned union here.'' These remarks were made in the presence of all the Respondent's drivers in the parking lot, who had all arrived by this time and were anywhere from 1 to 15 feet from Mayone Sr. He then took them, left, and went into his office.

About 5 minutes later, Mayone Sr. came back out. Mayone Sr. told the assembled employees, ''You're all fired.'' The men just stood there. Lester then told him, ''I'll give you an hour to an hour and a half to recognize the Union. If not, we're going to take out picket signs and picket.'' Mayone Sr. refused to recognize the Union. Instead, as related by Micelli, Mayone Sr. pulled him aside by the shoulder and said, ''What are you doing? Come inside. We'll talk, we'll work things out.'' Micell told him, ''No, this is what the men want. I have to stick it out, stay with the men.'' Micelli also saw Mayone Sr. approach at least two other employees. One was Bobby Wyant. He did not hear this conversation, only a report of it made later by Wyant of an alleged promise of benefit, testimony regarding which was stricken from the record on motion made by Respondent's counsel and not opposed by the General Counsel. Micelli did hear Mayone Sr. pull Hark Racene aside and tell him, ''I'll get that car loan. I'll co-sign for you. I'll get that loan for you.'' Mayone Sr. went back into his office, the men got their picket signs, went in front of the office off the street, and started picketing, and Mayone Sr. kept knocking at the window to get their attention and motioning to try to pull the pickets in. The picketing continued through the workday. The picket signs contained the legend ''Local 669 on strike for recognition'' followed by the names of each individual Respondent.

Micelli testified he picketed and struck Respondent because Mayone Sr. did not recognize the Union, because he fired all the men, and he no longer had a job.

On Tuesday, May 10, all the drivers again assembled in the parking lot around 7 a.m. and continued to picket the premises on the sidewalk in front of the offices. At one point during the day, Micelli said he heard a crash in the back of the building. He and some others went to the side of the building and saw Mayone Jr. had dropped some cases at a loading area to the rear. Mayone Jr. saw the pickets and called up to them, ''All you guys, all you are the shit under my feet. I walk upon all of you.'' Micelli went back to picketing and saw Mayone Sr. continue to knock on the window from inside the offices trying to call pickets in.

On the following day, May 11, Micelli was again outside Respondent's office entrance picketing with other drivers. That day, some of the men crossed the picket line and went in to the office to go back to work. Micelli went into the office later that day at Mayones Sr.'s request, asked if he could come back and Mayone Sr. told him that he had replaced him. When Micelli asked, ''What does that mean, am I fired?'' Mayone Sr. replied, ''Take it any way you want.'' As of May 11, no new employee had been hired to fill his position, although Mayone Sr. later testified that on May 12 he hired a Preston Nedeau to start May 13 to replace Micelli as a driver for Juice Time.

Picketing ceased after the third day on May 11.

In early June, after Micelli's unemployment insurance application had apparently been rejected because of Respondent's opposition, he telephoned Mayone Sr. Mayone Sr. explained that a misunderstanding, involving another employee who had been fired just prior to the strike, had been resolved and Micelli's claim should have no further problems. Mayone Sr. then asked Micelli, ''Are you still seeing Mr. Leo Lester?'' Micelli said, ''No.'' Mayone Sr. then told Micelli he did not want him to call up employees any more and harass them about the Union. Micelli denied he had called any employees about the Union.

On or about Wednesday or Thursday, June 15 or 16, Micelli received through the mails, a letter addressed to him from Mayone Sr., informing him that if he desired to return to work, to report at 7:30 a.m. on June 20. Mayone Sr. explained that the offer was made on advice of counsel and without prejudice to the Company's position in the NLRB proceeding. Miceill did return to work on June 20. He received no compensation for lost wages for the period from his separation from employment on May 11 to June 20.

In or about the first week of October, right after work and in Mayones Sr.'s office, Mayone Sr. told Micelli, ''Joe, I really appreciate if if you would get your statement from the NLRB Board.'' It is unclear how Respondent knew of Micelli's submission of any statement or statements to the Regional Office. Yet, Respondent's counsel, knowledgeable about Board procedure and aware of Micelli's inclusion as an alleged discriminatee, along with nine other employees, in paragraph VII of the complaint, and his adherence to the Union while other employees returned to work under circumstances alleged as unlawful inducements in the complaint

and about which evidence was adduced, to be discussed, infra, inferred correctly that Micelli had cooperated in the Region's investigation of the charges. In any event, Micelli provided three affidavits to the Region, dated May 12 and 16 and October 18.

Mayone Sr. explained that he wanted the statement so his lawyer could prepare, so they beat this thing together. The consolidated complaint, which had issued on June 30, was initially scheduled for hearing on August 30, but was rescheduled first to October 3, and then, by order of the Director dated September 23, was rescheduled to January 23, 1989, when hearing commenced. Micelli asked how he should go about getting it, should he call up Lester. Mayone Sr. said, ''No, no, stay away from that man. He's bad news.'' When Micelli again asked him how to go about it, Mayone Sr. pulled out an envelope with the NLRB Regional Office letterhead, ripped it off and gave it to Micelli. When Micelli then asked what he could do for him, Mayone Sr. said, ''Well, let's just stick together and beat this thing together.'' During the course of their discussion, Mayone Sr. kept asking Micelli if he was playing both sides, which Micelli denied doing. A few days later, Mayone Sr. asked Micelli if he had sent out the letter to the Board. Micelli responded that he had not. Mayone Sr. then said, ''Well, when you get back from vacation, you should have it and bring it in to me.'' At no time, according to Micelli, did Mayone Sr. ever assure him that he would not be subject to any reprisals for his failure to provide the affidavit. Neither was Micelli informed that the request for the affidavit was voluntary.

During Micelli's cross-examination, Respondent's counsel sought to discredit his testimony by attempting to show that, in fact, Micelli had his conversation with Mayone Sr. about being replaced on May 12 rather than May 11. That conversation took place on the day Micelli provided the Board agent with his first affidavit. In the affidavit, Micelli states, ''Today, Mayone called me into his office to tell me that he had replaced me.'' At first, Micelli agreed that the date he signed and swore to the contents was May 12. Later, Micelli reaffirmed his earlier testimony that the conversation with Mayone Sr. occurred on the third and last day of the picketing and strike which was May 11 and maintained this position in the face of further vigorous cross-examination. It appears that Micelli was told of his ''replacement'' on May 12, the date that he and Mayone Sr. went with Lester to the Board office from outside the Ravena facility. Micelli's error in this regard does not diminish the credible nature of his overall presentation of the facts as he recalled them.

In other respects, Micelli demonstrated firmness and consistency in defending his credibility from attack. Thus, Micelli maintained that Mayone Sr. used the phrase ''God damn'' in rejecting a union relationship while he owned the business, acknowledging that while he was aware Mayone Sr. was a religious person, so was he. Furthermore, while he had learned from the pamphlets distributed by the Union that the law prohibited his employer from firing him for striking, he got fired any way in the parking lot on the first day of the strike, and was also later told by Mayone Sr. on May 11 to take it, his being replaced, any way he wanted to.

In certain respects, Micelli strengthened his credibility on cross-examination, by explaining he had collected the employees' keys to the trucks and warehouse on Monday morning, May 9, as they had agreed to do at the union meeting, and then handed them in a bag to either Mayone Junior or Senior. Micelli was also firm in his recollection that on May 9 when Mayone Sr. told them they were all fired and then tried to pull guys off to the side, he did not tell them he was going to get replacements for them. Micelli also testified, without objection, on cross-examination that the day, May 11, that employee Steve Colletti came out of the office after having gone into work and asked Lester for the return of his union card, he did not hear their conversation but he did hear other employees standing nearby who also crossed the picket line and went back to work say to each other, ''He's offering something, we're going to go in and see what he has to offer.'' Among these employees were Wyant, Sanchez, and Thrush.

Based on my evaluation of the forthright, direct, and consistent nature of Micelli's testimony as described above, I credit his recital of the events preceding the strike, during the strike and picketing, and of his own exchanges with Mayone Sr. then and later. I do this with the knowledge that in certain respects other General Counsel's witnesses differ from Micelli in certain details of their presentation of the circumstances of May 9, yet they generally corroborate each other as to the basic events of that day, including the Union's demands, and the Respondent's immediate reactions expressed by both Mayones, leading inevitably to the strike and picketing, given the Union's and employees' resolve expressed at the meeting preceding the event.[6]

James Macie testified to the events of June 9, substantially corroborating Micelli's recital. Macie did not mention Mayone Sr.'s promise to keep his business union free on his initial nondirected recital. In Macie's recollection when Mayone Sr. returned to the parking lot after receiving Lester's papers demanding recognition, he said the men were all fired and would be replaced. Macie then reported that Mayone Jr., who had returned with his father, pulled him off to the side, and wanted to know why they were doing this. Macie said they wanted a Union, they were looking for sick days, personal days, hospitalization, more pay, and some job security. Mayone Jr. then told Macie he would take care of him; give him a little more money if he would just come in. Macie told Mayone Jr., ''No, he would rather stick with everybody.'' It will be recalled that Macie had been employed by Capital Vending and that Mayone Jr. had been his supervisor.

Macie, just as did Micelli, placed all the driver employees in the immediate area just feet from each other and from Leo Lester as he and Mayone Sr. exchanged words. The only exception appears to have been Harold Turk, who remained seated in or at a car a short distance away from the rest. As we shall see, Turk was personally approached by Mayone Sr. to come in to work. While he declined at the time, he did not engage in any picketing and returned to work shortly thereafter. Turk was the most senior by far of all the drivers.

At that time, Lester told the Mayones he would give them about half an hour before they began to picket if the Company did not recognize the Union. After half an hour, the picket signs were picked up and the men went out front to organize the picket line. Macie also picketed to obtain rec-

[6] In making credibility resolutions as to this witness and others, I have weighed the attacks made on their credibility during their cross-examinations as well as the contrary testimony by other witnesses, including Respondent witnesses, to be discussed, infra.

ognition and to protest his firing. He and the others remained picketing to 4:30 p.m.

The following day, May 10, the employees again picketed the whole day. Mayone Sr. tapped on the window trying to call people in, but without success.

At some point early in the morning of the following day, Wednesday, May 11, as the same employees had gathered to picket in front of the Ravena facility, Macie heard Bob Wyant and Steve Colletti say they were going back in; Mayone Sr. had taken care of them and that they believed they should go and talk to them. This testimony was not received for its truth but for the purpose of showing the state of mind of the witness. On hearing these remarks, Macie, with Rick Sanchez, followed Wyant and Colletti as they approached the office entrance to the Ravena facility. Both Mayones were standing at the entrance, with Mayone Jr. in front and Mayone Sr. a few feet to his rear. Wyant and Colletti started to go in past the Mayones' when Mayone Jr. said we would have to sign a card saying we did not want the Union anymore. Mayone Sr. said nothing to countermand his son. At that point, Macie told the Mayones' he did not want to go any further. He turned around and went back to the crowd. Sanchez followed Wyant and Colletti into the facility. Macie added that Mayone Jr. also asked him about the union cards and he told Mayone Jr. that Lester had them.

Macie confirmed that the picketing of Respondent's facility ceased after this third day, Wednesday, May 11.

Macie also received timely the same letter forwarded to Micelli offering reinstatement on June 20. A few days before that date, Macie went to the Ravina facility and informed management that he had gotten a better job starting around July 6 or 8, and that he would not be coming back to work. Macie received no pay for the period from the first day of picketing when he and all other employees were told they were fired until he responded to the company letter.

During his cross-examination, Macie reaffirmed his earlier testimony that on May 9, Mayone Sr. told the assembled employees they were all fired and would be replaced, rather than the language that Respondent counsel suggested that Mayone Sr. told them they were fired or replaced. Macie also corroborated Micelli that on Mayone Sr.'s first approach to the employees in the lot on May 9, Leo Lester handed Mayone Sr. three sets of papers seeking recognition of the Union by each of the Respondent entities. He had previously seen these papers at the last union meeting preceding the strike held at Brennan's. Mayone Sr. took these papers and went back to the office with them before returning and firing the men. One set consisted of three demand letters dated May 9 on union letterhead and signed by Lester, one each addressed to Mayone Sr. for Capital Vending, Juice Time, and Offi-Serve, claiming designation as majority representative of each entity's route salesmen, mechanics, cashiers, warehousemen, and utility men, offering to prove that status by an independent third party card check and demanding recognition and bargaining. The other set provided blank space for each entity to recognize the Union as exclusive bargaining agent for each group of employees, to agree to commence immediate negotiations, on May 11, and to agree to a recognition clause, and to union security and union checkoff by reference to enclosed provisions (not provided to Mayone Sr.).

Macie did acknowledge, after his recollection was refreshed by his pretrial affidavit, that before Mayone Jr. came over to the employees in the parking lot the morning of May 9 he had some words with Jeff David outside the facility which Macie could not hear because of their distance from the assembled employees.

Macie also recalled on specific questioning during cross-examination that on May 10, he had seen Mayone Sr. open the front door, grab a picket he could not identify, and urge him to come inside but the picket refused.

Macie insisted that he was never told by Mayone Sr. or anyone else in management that he had been replaced. He did recall coming to the facility on Friday, May 13, to pick up his last pay and return his uniform. The day before, Thursday, May 12, he and Micelli had gathered in front of the facility for a time. They were the only two employees among the full complement that struck on May 9 who had either not returned to work or had not been reinstated as employees by May 12.

Macie was a highly believable witness, who sought conscientiously to tell the truth and I credit his testimony.

The General Counsel called four other witnesses. Employee Malcolm Carter testified to his participation in the union meetings and the strike through the third day, May 11, after which he returned to work the following day, May 12. As explained by Carter, by the third day the strike was falling apart. The evening of May 11 he received a call from Rick Sanchez informing him that everybody else is going to work and suggesting he call Peter (Mayone Sr.) who wanted him back. Carter related that the conversation with Mayone Sr. consisted of his making Mayone Sr. aware that he was coming in the following day and Mayone Sr. voicing his approval and indicating there was no problem. At this point, Carter denied anything else was said and when asked specifically whether anything was said about requesting the return of his union card, he testified that Rick Sanchez told him that Steve Colletti thought it was a good idea to get the cards back. Carter was then shown his affidavit which he acknowledged having given during the investigation of the instant charges. It had been sworn to on June 9 in Mayone Sr.'s office and he had been made aware by Mayone Sr. he was going to be meeting the Board agent at the premises that day. At paragraph 9, Carter swore to the following:

> On the evening of May 11, I decided to return to work and phone Mayone, Sr. I wanted to return to work. He said, sure my job was there but that I would have to request my Union card be withdrawn. He said employee Colletti had some forms. There was no discussion about wages or benefits I would receive.

The affidavit contains no reference to Sanchez as the individual who told him to request the return of his card.

Carter denied that this paragraph was truthful in spite of the fact that he initialed the bottom of each page in the presence of and ''possibly'' at the request of the Board agent before swearing to the truthfulness of its contents. Carter claimed that he did not read it but that the Board agent read it to him, as it was being written before he initialed each page and swore to the document as a whole. Carter complained that the Board agent's handwriting was very poor, yet he was able to read without error that portion of the para-

graph in which Mayone Sr. told him he would have to request withdrawal of his union card and Colletti had some forms. Although Carter agreed he did not correct the agent after he read this paragraph, he asserted that ''apparently he [the Agent] didn't write it the same way . . . he was saying it . . . Peter didn't say anything about the cards. It was Rick Sanchez.'' Carter's explanation is not worthy of belief.[7] I find that paragraph 9 of the affidavit in so far as it relates to the substance of his conversation with Mayone Sr. on the evening of May reflects the truth and I credit it as against Carter's denial. Rule 801(d)(1) of the Federal Rules of Evidence permits the prior inconsistent statement of a witness, subject to cross-examination and given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, to be admissible as substantive evidence and not merely to impeach the witness' veracity. In so concluding, the advisory committee's note accompanying this Federal Rule recognizes that the trier of fact with the declarant before it can observe his demeanor and the nature of his testimony in weighing the truth or falsity of his testimony and the inconsistent prior statement. In accord: *Snaider Syrup Corp.*, 220 NLRB 238 fn. 1 (1975); *Starlite Mfg. Co.*, 172 NLRB 68, 72 (1968); *California v. Green*, 399 U.S. 149, 155 (1970); *De Sisto v. United States*, 329 F.2d 929, 933 (2d Cir. 1964), cert. denied 377 U.S. 979 (1964).

Carter went on to explain that when he returned to work on Thursday, May 12, Steve Colletti gave him a form off a stack, telling him it was a good idea to get the card back, that he would not be obligated to the Union, and there would not be fines if there was picket line crossing. The form that Carter (and other employees) signed had the employee's name and address typed in the upper left corner followed by a blank space to be filled in by the employee, and a request to withdraw his application to Local Union 669 effective immediately, followed by lines for the employee's signature and date. Carter signed his form on May 12 and handed it back to Colletti who was going to mail it registered to the Union in spite of a conflicting statement in his affidavit in which he swore that his wife mailed it in for him.

Carter testified that he was subpoenaed by the General Counsel to testify at the instant hearing, and that he refused the Union's request that he meet with counsel for the General Counsel the day before his testimony. Carter also acknowledged that after receiving a copy of his affidavit given to the Board, pursuant to a letter request made on August 22, he later asked Mayone Sr. if he wanted to look at it and then gave it to him, and that he did so to help Mayone Sr.

As to the employees' receipt of additional benefits on their return to work and their disavowal of union adherence and withdrawal from union membership, Carter testified as follows:

> Prior to the strike, he had individual coverage under the Company's Blue Cross/Blue Shield group medical plan for which he paid one half of the premium. Sometime during the week of May 16 immediately following his return to employment, the Company changed his coverage to a family basis and Carter ceased paying any premium.

Carter noted he had never driven a company van on the job but always drove his car to and from work.

Carter further testified that he had been driven to the hearing the day before by Mayone Sr. in Mayone's personal car. Sometime the prior week, while working twice out of the facility, driving Supervisor Grant's car, at Mayone Sr.'s request, he met with Respondent's lawyer to prepare for the hearing. Also present in the lawyer's office were Mayone Sr. and Rick Sanchez. Carter was later paid for this time away from work.

During his examination by Respondent's counsel, Carter was careful not to deny that Mayone Sr. told the assembled employees on May 9 that they were all fired. Carter did not hear it—he was not in Mayone Sr.'s immediate vicinity. Carter did corroborate prior General Counsel's witnesses that Lester gave Mayone Sr. a piece of paper and told him they would be striking for recognition and that everybody agreed to go out on strike at the second meeting a week prior. As to his receipt of additional medical coverage, Carter explained to Respondent's counsel that he understood a few weeks before the strike, there had been discussions between Mayone Sr. and the employees who drove Respondent's vans to the effect that when the Company got new vans it was purchasing, they would no longer be able to drive the vans home overnight as they had, but, the senior drivers would receive their choice of a small raise or paying their hospitalization to make up for the extra cost of the gas they would be using.

Irwin Wood, the union president, testified that when Mayone Jr. came over to the employees early on May 9, he told them, ''You'll never have a union here. You're all going to be fired, wait 'til my father gets here.'' After Mayone Sr. came up, took Lester's papers, went inside and then came out again, he responded to Lester's inquiry as to whether he was going to recognize the Union by saying ''no way.'' Mayone Sr. then approached one employee saying he wanted to talk to him. Lester responded by announcing the employees should stay together as a group. Wood recalled Mayone Sr.'s face turning red and in response to another request by Lester to recognize the Union, saying, ''As far as I'm concerned, you're all fired.'' Wood then said, ''Okay, you're firing these guys, we're going to strike.'' He turned around and opened up the trunk of his car and exposed the picket signs. Mayone Sr. looked in, saw them, and then went over to at least three employees that Wood could see and started grabbing them aside, telling them in turn he wanted to talk to them and that he had been fair with them. One employee he approached was Harold Turk standing by a car. Harold told him, ''I'm not going to get involved. I'm not going to strike, but I just don't want any involvement. If the guys want to do this, fine, but I'm going to stay out of this completely.'' After approaching two others, without success, Mayone Sr. said, ''Well, you guys are all going to be fired,'' and he stormed off. Lester had told him he would give him to 9:30 a.m. to recognize the Union. Wood left the scene at that point but returned around noon when picketing was taking place in the front.

[7] The General Counsel also sought to examine Carter as a hostile witness pursuant to Sec. 11(c) of the Federal Rules of Evidence. Carter's rejection of this significant item of evidence in his affidavit as well as his later testimony establishing his identity with Respondent in its campaign to defeat the Union fully justified the ruling I made that Carter was hostile within the meaning of the Rule.

Wood testified that during both of the exchanges between Lester and Mayone Sr., the employees were gathered in a group 10 to 15 feet across between two parked cars. Both Lester and Mayone Sr. spoke up in a fairly loud way. Wood also confirmed that Lester had handed Mayone Sr. two sets of papers, covering the three separate companies, which had been previously prepared. I have previously credited Micelli and Macie, and I now credit Wood, whose testimony corroborates that of both employees but provides slightly greater specificity and clarity.

Wood also corroborated earlier testimony from Micelli regarding Mayone Jr.'s intemporate remarks made in the presence of striking employees on the morning of May 10 as he was unloading soda off a hand truck. When the cases fell to the ground, Wood called over ''You've got guys out here. You recognize us, these guys will go back to work. You won't have to do this stuff.'' Mayone Jr. came forward, toward Wood, pointed a finger close to his face, and in an angry tone, said, ''There's no way that these guys are going to come back. As far as we told you, they're fired.'' When Wood said he could not do that, Mayone Jr. responded, ''These guys are nothing but shit.'' This testimony, which expands on that previously provided by Micelli, but which is consistent with it, is also credited.

During his cross-examination, Wood further recalled Lester telling Mayone Sr. when he handed him the papers that ''We're the Union, and we'd like to represent the employees here. We have a majority of the cards and we have no problems getting a priest or somebody here to review the cards and to recognize us.'' Wood further testified that when Mayone Sr. spoke that morning to his most senior employee, Harold Turk, he told him, ''Come on in. Come back to work. We'll make things right whatever your problems are.''

Leo Lester also testified to the events of May 9. Prior to either Mayone Sr. arriving on the scene, he solicited a union authorization card from Harold Turk in the company parking lot. Lester testified to Mayone Jr.'s comments upon being apprised of the situation involving the union adherence of the drivers. When the employees responded to his entreaty to enter the facility to go to work by informing him they wanted him to talk to their union representative who was present and they wanted to be represented by the Union, Mayone Jr. started cursing and threatening, ''You f— guys aren't nobody. We ain't going to have a f—ing union. You come here or else you're all fired. Come in or you're all fired.'' When Lester sought to point out the men had rights which he should not take away, Mayone Jr. went off with the comment, ''We'll see about this.''

Lester recalled Mayone Sr. coming on the scene and immediately going over to Turk, placing a hand on him and saying to him, ''I've been good to you. What are you doing? Come on, I want to talk to you.'' Turk told him, ''No, I'm with the group. I'm staying with the group.'' Turk also said, ''As long as everybody else is joining, I'm joining too. I'm sticking with the guys. About time they got a union in here.'' Mayone Sr. then approached other employees, among them Steve Colletti, Joe Miceill, and Malcolm (Bill) Carter, who rode together, Bob Wyant and Rick Sanchez, grabbing them off to the side and repeating the entreaties, ''I've been good to you; please don't do this time to me; I'll take care of you; what do you want, I'll give it to you; come on in.'' Lester commented to Wood, ''This is pathetic, here is a man who violated rights, now he's coming back this way to people.''

When handing Mayone Sr. the sets of papers, including the bargaining and recognition demands, Lester said, ''Here is [sic] some of the papers. We are requesting recognition—the bargaining unit people are here—also some language which you will have stipulated. Look it over, get in touch with your lawyer. I'll give you to 9:30. Get back to us.'' Mayone Sr. did not respond to the demands and at 9:30 a.m., the picketing commenced.

Lester also recounted Mayone Sr.'s statement to the effect that either they come back to work or they are all fired. Mayone Sr. interspersed his attempts to approach and induce individual employees to come in to work with the general comment, ''If you don't come back, you're all fired.''

Lester also reported Mayone Sr.'s subsequent attempts to induce employees to cross the picket line, leaving the front door where he was stationed and reaching for individual men as they picketed, going by the driveway, with the comment, ''Come on, I want to talk to you. I'll take care of you. Come on.''

While Lester's testimony at first blush appears to be at variance with Woods' and Micellis', particularly as to Mayone Jr.'s comments on May 9, Turk's response to Mayone Sr.'s approach to him, and the sequence of events before the picketing commenced, I find that these variances are at best, superficial. It was consistent with Mayone Jr.'s mean spirited and crude approach to the events of May 9 and 10 to have used the language attributed to him and to have uttered the threats under the stress and shock of the moment also attributed to him by Lester. Turk's apparent support of union solidarity by the men on the morning of May 9, if dictated only by having just then signed a card in their presence and an effort to straddle a thin line between wanting to support their unified effort and not wanting to hurt his longtime employer, shows in the comments Lester attributes to him, a stronger prounion sentiment than that portrayed by Wood. I credit Lester's version here. Finally, Lester was apparently mixed up about Mayone Sr.'s failure to come back out after handing him the Union's demands. Nonetheless, his attributing the various remarks Mayone Sr. made to him, to the employees in a group, and to individual employees, is generally corroborative of the other witnesses' testimony, and is credited.

Lester finally noted that at no time did Respondent bargain with the Union over the raises in pay, or changes made in its employees' health insurance coverage or premiums.

During his cross-examination, Lester could not recall definitely but, he might have been approached by an employee on May 11 seeking the return of his card, perhaps Rick (Sanchez) or Rich (Thrush). Lester was certain that the employee was not Steve Colletti and in this he was mistaken, his testimony in this regard being at variance with other General Counsel's witnesses as well as that of Respondent's witnesses, including Colletti and Sanchez. To the extent that Sanchez was with Colletti when the request was made, Lester's testimony was accurate. I do not deem this variance significant or damaging to Lester's credibility. Furthermore, the subject matter was not covered on his direct examination, Lester was recalling an incident which he apparently had not reviewed prior to his testimony, and his testimony shows he

was not all that familiar with the proper names and characteristics of the individual employees who joined in the strike.

Lester also confirmed that before work on May 9, Jeff Dowd, whom he knew from an earlier union campaign, exchanged words with Mayone Jr. before Mayone Jr. came over to the group.

In his affidavit, portions of which were read into the record—the document was later received in evidence—Lester stated that Wood give at least a set of the demand letters and perhaps the set of blank recognition agreements to Mayone Jr. when he came over to the assembled group. In his affidavit, while Lester does not in haec verba state that he gave another set of the papers to Mayone Sr. when he arrived on the scene, its affidavit does contain the statement ''I told him we were prepared to picket but I would give him a chance to think it over *and look at the paper before doing so*, so that he would not be embarrassed in the community. He refused to shake my hand and returned to the office.'' [Emphasis added.] On the witness stand, after first denying this transaction and then being shown his affidavit, Lester adequately explained that Wood, who did not so testify but who was also not asked specifically about the matter of his providing the papers to Mayone Jr., did give a set of the papers to Mayone Jr., but because of Mayone Jr.'s anger and hostility which might result in his destroying them, he, Lester wanted to make sure his father knew what the Union was seeking and he later personally gave another set, of which they had numerous copies, to Mayone Sr.

More significant as a possible basis for impeachment was Lester's failure to include in his affidavit, any reference to either Mayone Sr.'s firing of the employees or threat to fire them if they did not return to work. Lester did clarify the sequence of events, about which he had been unsure and inaccurate on direct examination, now placing Mayone Sr's. statement about firing the men after receiving the Union's demands, orally and in writing, on his initial visit. Lester admitted the omission of any reference to this statement from his affidavit. He also explained he may have omitted the reference because he had already attributed a like threat to Mayone Jr. On balance, I do not consider this a contradiction with his testimony at hearing, and, in view of the multiple witnesses whose testimony includes these threats by Mayone Sr. (aside from those, including Lester, who attributed a like threat to Mayone Jr.), I credit Lester's trial testimony as against his May 12 sworn statement in this regard.

Mayone Sr. called as a witness by the General Counsel, provided significant facts with respect to wage and other benefits provided employees immediately on their disavowal of the Union and their return to employment. Until March, Respondent leased all of its vans used in the various routes and businesses of the three entities. In March, Respondent purchased six or seven new vans to replace the leased vans, but delivery was not immediate in all cases so these same employees continued to use leased vans until their new vans were delivered. Mayone Sr. informed some of the drivers prior to the union organizational campaign that when the new vans came in they could no longer take the vans home a practice that he bad tolerated with the leased vans but he would compensate them for the loss, i.e., the cost of transportation to and from work in their own vehicles which he estimated at between $15 and $25 a week. Mayone Sr.'s offer took the form of extra salary or Respondent paying the full premium on the health insurance which they currently shared at the employee's option. At least four of the new vans had not yet been delivered for Wyant Turk, Sanchez, and Cymbalisty on May 14, 12, 13, or 16 when they returned to work. Yet on their return these four were informed they could no longer take the leased vans home and were offered the option described.

Prior to the strike six employees, Wyant, Turk, Sanchez, Thrush, Cymbalisty, and a Mike Meyers who quit on May 6, had been permitted to take company vans home.

The changes in these employees' terms and conditions of employment were made effective with the payroll week commencing May 16 on their return to work. At Wyant's request, he was permitted to take off from work 3 hours on Wednesday afternoon. For working 4-1/2 days a week, including a half day on Wednesday from 7 a.m. to 12 noon, Wyant's was salary reduced by $22 a week even though Mayone Sr. estimated Wyant's pay was $32 for the last 6 hours. In permitting the time off and in making this wage determination, Mayone Sr. took into account the loss of use of the van off work hours. Cymbalisty not previously covered, requested family medical coverage for which Respondent now agreed to pay half or $25 a week; Cymbalisty agreed to pay the other half. Unlike the situation with other employees who had been paying half the premium on family coverage, like Thrush, see infra, Cymbalisty had paid none so Mayone Sr. was unwilling to provide him with a $50 benefit, in contrast to the maximum $25 benefit provided Thrush among others.

On his return, Turk received a pay raise of $20 per week and was also permitted to continue to have the use of a van to and from his home, as an exception to Respondent's change in policy because as Mayone Sr. described it, Turk was a very special case because the following week would be Turk's 20th consecutive year in Respondent's employ. Thrush continued full family health coverage, now fully paid for by Respondent whereas previously he had paid half—a $25 a week benefit. Sanchez' premium for individual coverage, previously shared, was now paid by Respondent—a $12.50 benefit and, in addition, he received a $10 raise. Carter, like Thrush, now had his family medical coverage fully paid by Respondent. Colletti received a $25 weekly salary increase.

During the presentation of Respondent's case, Rick Sanchez, whose appearance was not compelled by subpoena, testified that on May 9, Mayone Jr. made no statement that employees were fired, but he did show frustration when employees refused to heed his direction to return to work. Mayone Jr. later told them, ''I have a company to run here . . . eventually, you will be replaced if you're going to be on strike; I'm going to have to replace you to keep the business running.'' Sanchez did not hear Mayone Sr. tell employees they were fired or that he would give them increased wages or anything of benefit if they come in to work. Sanchez also testified that when Lester offered the papers to him saying, ''Read these, take these and sign these,'' Mayone Sr. did not want to look at them and . . .''just stayed away from the papers, and he did not want to talk to Leo. But Leo said, ''Anything you have to say, say it to me.''' After prompting on the matter, Sanchez recalled that after about 15 minutes Mayone Sr. came back out to the employees a second time before they picketed. ''Mayone, Sr.

wanted to talk to people. He didn't want to talk to Leo. He was kind of trying to talk to individuals, but people were pulling away because we were told not to speak to him personally. We were told to be represented by Leo Lester.'' Mayone Sr. had no success and went back inside. It was before he went back inside that he made the remarks about eventual replacement. Mayone Sr. did plead with him ''please come back to work.'' Incredibly, Sanchez did not hear his remarks made to other employees, even though they were all within 10 to 15 feet of each other.

During the picketing that first day, Mayone Sr. came out once in a while asking individuals on the line as they passed by him, including Sanchez himself, if they were going to come back to work. Receiving no direct answers, he went back inside.

Sanchez and the others picketed again on the second day, May 10. Questioned by Respondent's counsel about his abandonment of the Union and return to work, Sanchez said it occurred on Tuesday, May 10. As he testified, ''I couldn't see Mr. Mayone accepting the union into his company and I spoke with Steve Colletti at the time while we were walking and he was feeling the same way. . . . I just wanted to get back to work at that point.''

Tuesday evening, Colletti telephoned him at his house and said he was seriously considering going back to work the next day. Sanchez agreed to go back if Colletti did. Colletti then said, ''We should get our cards we signed back from the union just to avoid any penalties or fines for going back across the picket line.'' Sanchez then called Wyant and told him what he and Colletti planned to do. Wyant resisted at first; he was kind of nervous about abandoning the other strikers, but after a few minutes he agreed.

Sanchez then called Mayone Sr. He told him that Steve, Bobby, and he were pretty sure they would be returning to work the next day and a few others, including his roommate, Rick Thrush, were undecided. Mayone Sr. said that if he wants to come back, Thrush's job was waiting for him. Mayone Sr. also said he was happy they were coming back. There were no hard feelings; he held no grudges against them for what they were doing; and their jobs were secure waiting for them. Sanchez later reversed his testimony, denying that he had any conversation with Mayone Sr. on the telephone. This denial was made when Sanchez later acknowledged to the Union's counsel that it was possible he had informed Lester he would be receiving a raise if he went back to work.

Wednesday morning, May 11, Sanchez met Wyant. Then when Colletti showed up and the three of them told the others what they were doing, they drew hostile remarks. Colletti went into the facility first, followed by Wyant. Sanchez remained outside for an hour trying to persuade Thrush to come back too. After 15 minutes, Colletti and Wyant came back out, and approached Leo Lester who was in front of the facility with the other employees. He heard Colletti ask for the return of their union cards. Lester replied that he did not have them and said Colletti would have to send to Albany for their return—the location of the Union's office. Sanchez went into the facility shortly after 9 a.m., reported to Mayone Sr., checked in with his supervisor, and took off on his route. On entering the facility, he saw Colletti at his desk, where he wrote up the day's receipts and went over customer accounts. Colletti told Sanchez he was going to have a form typed to request the return of their cards, relieving them of their obligation to the Union.

Sanchez swore that neither Mayone Sr. nor Mayone Jr. ever said anything to him about having to get his card back or get out of the Union for him to return to work. Neither did he discuss the matter with Supervisor Grant Lewis.

That evening, May 11, Sanchez telephoned Bill Carter, told him the Union was a lost cause, and was more or less being dissolved right there, more guys were going to be working than striking. Sanchez also told Carter ''about the thing with the cards, too, here we should try to avoid any fines or penalties because of crossing the picket line.''

On the morning of May 12, at work, Colletti showed him a piece of paper with writing requesting the return of his union card, told him to take one, sign it and date it when you started work. Sanchez signed and dated it May 11 and returned it to Colletti, also providing his address. Colletti said he would take care of it.

Sanchez explained how, beginning May 16, his pay was increased $10 and the Company started paying the full cost of individual medical coverage. When Sanchez got his new company van in February, replacing a leased van, later that month Mayone Sr. told him he would be leaving it at the warehouse. Mayone Sr. also said pretty soon everybody would have to be leaving the vans there at night to keep the mileage down on them and to reduce wear and tear. Before imposing the change in van use, Mayone Sr. allowed time for the employees to make arrangements, e.g., by purchasing second vehicles, to go back and forth from work. Sanchez had purchased a used car in November 1987. It was not until the second week of April that Sanchez started leaving the van after work at the facility and used his own car to and from home.

Mayone Sr. told him he would be compensated for the extra expense associated with using his own vehicle. He did not specify when it was to be but said it would be soon. This was the reason, according to Sanchez, that he was kind of pushed towards going with the strike, because by the end of April and into the second week of May, he was losing company vehicle benefits. For at least 3 weeks in April and then into May, Sanchez received no increase in salary nor any other compensation to make up for the extra out of pocket expenses he now incurred arising from using his own vehicle the 22 miles between the facility and his home.

Sanchez also testified he asked for a copy of his affidavit supplied the board in the prehearing investigation because Mayone Sr. had asked him to and had supplied him the request for his signature. After receiving it from the Region, he gave it to Mayone Sr. for review by Respondent's attorney.

Sanchez participated in the strike because of concern about certain poor working conditions, e.g., the uneven floor in the warehouse, and an interest in improving conditions and safety. He abandoned the strike because he did not realize what he was getting himself into financially. He solicited his friends among the other employees to abandon the strike for the same reason. But Sanchez also testified that by May 10 he reached the conclusion that he could not see Mayone Sr. accepting the Union into his company. By May 10, Mayone Sr. had shown no interest in reading any papers the Union offered him, had stated the Union would not be good for the Company; it was a small company; and it was the second

day with no results and no prospects of any good coming [from the strike].

During his cross-examination, Sanchez initially recalled Mayone Jr. on May 9 telling the employees before the strike among other things, ''You're not going to get anything out of this,'' or ''You guys are wasting your time doing this.'' A minute later, Sanchez denied that Mayone Jr. had told them, ''You're wasting your time; you'll never get anything through this.'' Then, Sanchez flipflopped again, acknowledging Mayone Jr. told them only ''you're wasting your time,'' and nothing more other than ''get back to work. I can't believe this.''

Later, Sanchez heard Mayone Sr. ask Lester ''why are you doing this? I'm a small company. You know, why are you striking? We're a very small company. It will be more harm than good—the Union would do more harm than good.'' At this time the group of employees was pretty much together close to Mayone Sr. and Lester.

Although Sanchez now repeated his earlier testimony that on Mayone Sr.'s first visit to the group early on May 9 he told them they would be replaced if they did not come back to work, when confronted with his pretrial affidavit Sanchez was forced to change this testimony to ''I had a feeling that we would be replaced.'' In his affidavit, Sanchez swore before a Board agent that ''Peter said we could have our jobs if we came back to work. *He didn't say what would happen if we didn't come back*. He did say the office would be open if we wanted to talk to him. He went back inside.'' [Emphasis added.]

Sanchez also changed his testimony in another significant respect. At different times, he testified that he did not think Mayone Sr. took the papers Lester proffered him, and that he did not know if Mayone Sr. took them or not.

On cross-examination, Sanchez for the first time testified to his conversation with Mayone Sr. when he crossed the picket line and went into the facility on May 11. Having been refreshed by his affidavit, Sanchez explained that Mayone Sr. asked him what the employees wanted and why they went on strike. Sanchez told him they wanted better conditions, talk about increases in salary on a regular scale they could understand, and know how many raises we would be getting in the future. Mayone Sr. said he would be more open about that in the future, they would have more meetings, regular scheduled meetings on upgrades in the conditions, and some raises. Since his return to work, Mayone Sr. has implemented these changes by being more open in a casual way; they can go in and sit down and talk with him, and he has been able to discuss raises and his policy in this regard.

As to his salary increase and health plan improvement, the promises Mayone Sr. had made in early April, of a $10 increase in salary and payment in full of the premium for his individual health coverage, had not been implemented by the time of the strike. On Sanchez' return to work on Wednesday, May 11, he got the $10 increase and the benefit of no deduction from pay for half of the insurance premium, prorated, in his paycheck issued Friday, May 13. On May 10, the second day of the strike, after saying he did not recall the matter, Sanchez agreed it was possible that he told Lester he was going to get a pay raise if he went back to work.

As to procuring his affidavit sometime in June, Sanchez testified at first that he and other employees in the office were told by Mayone Sr. that they would have to request then so that the attorney could review them to prepare his case. Then, Sanchez changed this to Mayone Sr. saying it would be helpful if the attorney had the information. Mayone Sr. provided the form request to the Region for Sanchez and other employees by making them available on a conference table in his office. Sanchez signed one and left it in Mayone Sr.'s office.

In fact, a series of letter requests dated in August, signed by employees and addressed to the Board's Albany Resident Office were received by counsel for the General Counsel who then caused a book letter to be prepared on or about August 25 to accompany the affidavits forwarded to each requesting employee.

Robert (Bobby) Wyant, another Respondent witness, also denied that on May 9 Mayone Jr. said employees would be fired if they did not return to work. Wyant could not hear anything Mayone Sr. said when he came out. He was in the back, with Turk and Cymbalisty, a little removed from the others. Yet, he did hear Lester say to Mayone Sr. they were striking for recognition. Wyant denied being solicited by any person to return to work. Then immediately afterward, he testified about Colletti's calling him Tuesday night to say he was going in to work, then calling Sanchez to learn the same thing. Wyant then called Mayone Sr. to tell him he was going to cross the picket line Wednesday morning. Mayone Sr. said, ''Very good.'' It was a very short conversation. He said nothing about getting out of the Union.

When Wyant crossed the line on May 11, he asked Mayone Sr. if he could take the rest of the week off for personal problems. Mayone Sr. agreed. On May 16 when he actually returned to work, Colletti had left him a form to sign requesting the return of his card from the Union and Wyant signed it and left it on Colletti's desk. Yet, Wyant's request to the Union is dated Wednesday, May 11. Wyant denied any Respondent promise of benefit for returning to work or conditioning his return on withdrawing from the Union.

On Wyant's return on May 16, he and Mayone Sr. worked out a ''deal'' whereby he took off Wednesday afternoons for a reduction of $22, from $322 to $300 a week, in pay. Wyant always had and continues to maintain his own health insurance independent of the Company's policy. On cross-examination Wyant differed with Sanchez in denying that Mayone Jr. appeared to become frustrated and asserted he used normal tones when he told the employees on May 11 to go back to work (and no one did). He also placed Mayone Jr.'s talk with Jeff Dowd as taking place after he addressed the drivers rather than before as others had previously testified.

Kenneth Cymbalisty, like Wyant, recalled none of Mayone Sr.'s comments to the employees because of his distance from the group around Lester and Mayone Sr. Yet, he also swore they were only about 8 to 10 feet away, and further swore that Mayone Sr. did not address remarks to the employees. But Cymbalisty recounted Mayone Sr.'s entreaties to employees to return to work when he came back outside the second time. Cymbalisty denied being questioned by Mayone Sr. about getting his union card back when he called Mayone Sr. Wednesday evening to ask him if he could return to work but on Friday, not Thursday. Cymbalisty also denied that either Mayone Sr. or Mayone Jr. ever said that employees would be fired if they did not return to work. Yet,

as noted, he did not hear any remarks by Mayone Sr. on May 9. On Friday, May 13, he signed and returned to Colletti the form withdrawing his union application.

Cymbalisty received his insurance benefit by telling Mayone Sr. on his May 13 return to work that he would like family coverage for himself and his son. He knew the benefit was available but never discussed it with Mayone Sr. before the strike. Cymbalisty continued taking a leased van home until early June and did not get a new company van until around December. Cymbalisty thus received a double benefit—family coverage plus the $25 premium Respondent now paid for its half share of that coverage.

Cymbalisty testified at first that he called Mayone Sr. to go back to work after Wyant called him and told him that Mayone Sr. would be willing to let him go back to work. Later, Cymbalisty clarified that he assumed from Wyant's comments about having spoken to Mayone Sr. that he ultimately would be welcomed back.

During his cross-examination, Cymbalisty affirmed that Mayone Jr. was upset and distraught when he spoke to employees early on May 9. Since he was not paying attention, Mayone Jr. could have made comments other than asking what the employees were doing. When he spoke with Mayone Sr. who returned his call the evening of May 11, Mayone Sr. asked him why he had walked off the job. Cymbalisty took this as a request to recite any problem Cymbalisty had encountered on the job. Cymbalisty explained that there had been no communication between management, his son, and the employees, that there was no talking to Mayone Jr. prior to the strike. It will be recalled, Cymbalisty worked for Capital Vending, the Respondent entity supervised and managed by Mayone Jr. Mayone Sr. responded that we will have communication. Mayone Sr.'s response was one of the reasons that he went back to work. Since his return, Mayone Sr. has been more open and communicative, in terms of more contact and meetings with the employees. Prior to the strike Cymbalisty did not see this openness.

Cymbalisty acknowledged that he was confused, presumably about the events which he witnessed, both when providing the Board agent with a statement and while testifying. This became particularly evident when the contradiction about what he did with the written request to withdraw his union application became apparent, Cymbalisty having sworn in his affidavit that he personally mailed to the Union the signed form given to him by Colletti on May 13, and having testified that he signed and gave it back to Colletti. Further confusion was probably manifested when Cymbalisty expressed assurance that Mayone Sr. was angry at him for having participated in the strike, yet nothing Mayone Sr. said showed this anger or dislike or unhappiness at what he, Cymbalisty, had done. Only a shaking of his hands on May 9 showed his concern.

The final employee witness called by Respondent was Steve Colletti. He was not present on May 9 when Mayone Jr. spoke with the employees prior to the picketing, having arrived at the lot at 7:30 a.m. Neither did Colletti see Mayone Sr. in conversation with Lester shortly afterward. He could only recall Mayone Sr. pulling himself, Wyant and Micelli over to the side to ask them if they would come back to work. Thus, Colletti testified he did not hear Mayone Sr. tell employees they would be fired for striking or not returning to work. Neither did Colletti, in contrast to other witnesses, see Mayone Sr. later that day, neither at the door or window beckoning pickets in, nor emerging to button hole them as they walked by.

By the following morning, May 10, Colletti had had enough. Nothing was getting accomplished. He told the other pickets he would follow Grant Lewis, the supervisor, who was driving a van that day, to the Coeymans warehouse, and report what he saw. But Colletti used this as a strategy to leave the picket line and contact the Respondent to return to work. He called Mayone Sr. around mid-day and agreed to come in to work the following day. That evening, Colletti contacted Sanchez and Wyant, who both agreed to come back to work with him the next day. Colletti called back Mayone Sr. to tell him of their plans. Colletti swore that at no time in these Tuesday conversations did Mayone bring up his leaving the Union.

On Wednesday morning, Colletti and Wyant started into the office in the face of strong displeasure voiced by Micelli and Lester. Sanchez appeared to hold back. After being inside the office for only a couple of minutes, so they could cool down, he and Wyant went back outside and asked Lester for their union cards. Lester told them he did not have them, and they had to go to Albany for them or could write a letter. Colletti now explained that he asked for his card because he had heard Lester tell an employee at the second union meeting that those employees who did not strike could be fined for every day the strike continued. Colletti wanted to avoid fines or calling him names. If he got his card back, maybe the Union would not have any record of his ever trying to join, ''or whatever we were really doing.'' Colletti denied that Mayone Sr. had asked him, to get his card back.

At this point he, Wyant and now Sanchez went back inside the office. Because of fear of damage to their personal vehicles, they drove them to Mayone Sr.'s driveway after getting Mayone Sr.'s permission to do so. While at the warehouse, before going out on their routes, Colletti discussed getting their cards back, and then called his girlfriend to have her type a letter for this purpose. Those letters are identical in their body, a single sentence in which the signatory requests withdrawal of his union application, effective immediately, followed by employee signature and date. Each letter, of the eight received in evidence, signed by employees Wyant, Thrush, Colletti, Cymbalisty, Racene, Sanchez, Turk, and Carter, on either May 11, 12, or 13, also contain their typed name and address in the upper left portion. No addressee appears. They were all mailed by Colletti and received by the Union on May 17.

Collettti said he first told Mayone Sr. of his intentions to get back his card on Wednesday, May 11. That day, he got the names and addresses of the employees from the bookkeeper who wrote them out for him. The basic letter was typed, reproduced, and then addresses on the letters and employees were also typed by his girlfriend Wednesday evening and he distributed them on Thursday and Friday, except for Wyant's who signed on Monday. They were all dated the day they each returned to work. Colletti mailed each registered or certified, return receipt requested.

As to his pay increase, Colletti testified that about 4 or 5 days before the first union meeting on April 27 he had a discussion with Mayone Sr. in which Mayone Sr. agreed to in-

crease his pay by $25 a week.[8] Colletti never drove a company van home. Colletti could not remember if Mayone Sr. told him it would start the following week or the week after that. At the first union meeting, Colletti asked Lester if the $25 raise would affect his getting more with the other employees through the Union. Lester told him it would not affect anything.

Colletti confirmed that Mayone Sr. later asked the employees if they could get copies of their statements to help his case. Colletti, unlike others who testified to this matter, noted that Mayone Sr. said it was up to them. Colletti agreed and Mayone Sr. gave him a form to sign; Colletti signed, and when he received his affidavit, he gave it to Mayone Sr.

Colletti's pay was $275 per week from the week ending January 18 to the week ending Friday, May 6, $180 for the week ending May 13, and $300 for each of the following 3 weeks, ending May 20 and 27 and June 3. Thus, the increase of $25 was first reflected in his pay for May 11, 12, and 13 when he crossed the picket line and returned to work. There was no change throughout these periods in his health insurance deduction, which remained at $25.18.

Colletti recalled while undergoing cross-examination that ''maybe'' Mayone Sr. had told him, when asking for his statement, that it would be good if we all stuck together on this. Colletti's written request, dated August 22 and mailed by Respondent, was received by the Board's Albany Regional Office on August 25.

During his cross-examination by union counsel, Colletti maintained that he received the job title of sales manager about a month before he came back to work (from striking) on May 11. Yet, on his union authorization card dated April 20, he lists his title as truckdriver. Further, while he was interested in avoiding union fines, he did not know if he had retained the signed postal receipt establishing delivery to the Union of his request for withdrawal of his membership application.

Colletti later clarified that he calls himself sales manager; it is not an official job title that Respondent bestowed on him. This title reflects his function of preparing art work and doing more buying and contacting companies to get better prices for Respondent's purchases of supplies. He still receives the same one shot commission on procuring new sales accounts. He continues to drive a route for the Company.

Both Mayones testified for Respondent. Mayone Jr. admitted that in the morning of May 9, after approaching the parking area, he pulled Macie aside, told him he was surprised he was out there, and told him to come inside and maybe we could work something out, that he did not have to be out there with the rest of these men. Mayone Jr.'s testimony in this regard immediately followed his disclosure that before reaching the parking area on foot, after parking his own car in a separate location, he was greeted by Jeff Doud who told him the employees were on strike and represented by Leo Lester whom he knew and he should be very careful as to what he said to the men, that they had the right to go out on strike.

Mayone Jr. also corroborated other General Counsel's witnesses that he took papers from Lester—''a form of some type''—who wanted him to sign ''something.'' Mayone Jr. testified he did not look at the papers and did not know what he did with them. Although Mayone Jr. was with the group of employees for 10 to 15 minutes, he claims he talked only to Macie during this period.

After leaving the group, Mayone Jr. saw his father pulling into the parking area. Jeff Dowd was there, and told his father the men had gone out on strike and Leo Lester was representing the men for them to recognize the Union. He then accompanied his father over to the group. Lester approached him with the same form given to Mayone Jr. and said the men were now being represented by himself and Local 669 and any questions or any bargaining had to be dealt through Leo Lester. His father pulled Harold Turk aside but Mayone Jr. did not hear their conversation and he soon left to go back to the office to set up the routes and fill the orders for the day. According to Mayone Jr. the routes that day were covered by himself, a brother, and a state worker familiar with the routes, both of whom were temporary and did not remain at work after the strike, Jeff Dowd, the mechanic, Steve Wilkins, the one driver who reported on time to work that day and did not strike, and Supervisor Grant Lewis.

Mayone Jr. gave his version of events on May 10. He might have dropped some cases while loading his truck. Lester Wood and some employees were hovering at the top of the area where the trucks load and yelling obscene things. Wood, in particular, was grabbing his private parts and making obscene gestures at him. Mayone Jr. admitted making some comments directed to Wood but could not remember what they were. Mayone Jr. denied telling employees they were fired if they did not return to work or that they would have to drop out of the Union or sign a form withdrawing from the Union before they could return to work.

Now, on cross-examination, Mayone Jr. changed his testimony, and denied that he told Macie maybe we could work something out. Now, Mayone Jr. swore he told Macie, ''You, know, if there's anything you want to talk about, we can go in and talk.'' Mayone Jr. then changed that response to swear he told Macie, we can talk about any problems you are having. Apparently, Macie knew what he meant because Mayone Jr. next testified that Macie told him ''every time that I have to take a day off or I'm sick, I'm in fear of losing my job.'' Mayone Jr. then reminded him that 2 days ago when Macie was crying about being sick, he had a driver come in and take him home.

Mayone Jr. acknowledged that on May 9 he knew the Union through Lester was claiming to be the representative of Respondent's employees and requesting the Company bargain with the Union as such representative.

Mayone Jr. characterized his father as very shocked by the whole thing when he arrived on the scene and was told by his son the men had gone on strike and were represented by Leo Lester from Local 669.

Now, Mayone Jr. also reports the statement his father made to Turk, contrary to his testimony on direct that he did not hear it. His father told Turk, ''Harold, you don't have to be out here with the these men.''

Mayone Jr. also admitted certain statements he had made to a Board agent during an interview on May 9 which differed markedly from his testimony. In his interview, he told the agent of his conversation with Dowd but not of his being warned to be careful about what he said to the men. Mayone Jr. also told the agent that the only time he asked any em-

[8] Colletti later changed the date of this conversation with Mayone Sr. to either Friday, April 22, or Monday, April 25.

ployee what the work problems were was after the strikers returned to work, a direct contradiction with his earlier report of his inquiry of Macie on May 9. As to his questioning of employees after the strike, Mayone Jr. made inquiry of a couple of employees on their return and received the response they felt they had some problems, and that the only way they could be taken seriously or the problems recognized was if they went out. However, Mayone Jr. learned from these returning employees that I they had felt pressured by one or two employees to go out on strike, and those employees were Macie and Micelli.

Mayone Sr. testified he received the same warning from Dowd as his son initially testified to receiving, but in greater detail; ''You've got to be careful what you say because . . . it can get taken out of context. . . . you cannot fire anybody but you can hire replacements.'' Significantly, Dowd, a witness primarily available to it, was not called to the witness stand by Respondent to corroborate what Respondent in its defense believed to be an important piece of advice given before Mayone Sr. made any statements to Lester, Wood, or the employees the morning of the demand and commencement of the strike. I infer that Dowd would not have supported the Mayones' claim of warnings before confronting the union agents and employees, e.g., *NLRB v. A.P.W. Products Co*., 316 F.2d 899, 903–904 (2d Cir. 1963), and I do not credit Mayone Sr.'s or Jr.'s testimony in this regard.

Mayone Sr. was very surprised; it was a traumatic experience for him when be learned his drivers were united with the Union in its demands and in withholding their services. Lester told him he represented Teamsters Local Bakery, et cetera 669 and your men unanimously want me to represent them and I have all their signed cards. Mayone Sr. refused to shake Lester's extended hand. Lester handed him three pieces of paper saying, ''I want you to sign this and this will all be behind you.'' According to Mayone Sr. those papers only included the three form letters for him to sign recognizing the Union, agreeing to negotiate commencing May 11, and agreeing to certain provisions, including recognition, union security and checkoff. He did not receive the three demand letters including an offer of a third party check of authorization cards, claim of majority representation, and description of the unit in which bargaining was demanded. Mayone Sr. by his own admission, was in shock. He approached Turk seated on the passenger side of a car and asked what was going on. Mayone said, ''Next week[9] you'll be with me 20 years and look at this now. Turk didn't want any part of this but he didn't want to be the only one and he wanted the men to be together.'' Mayone testified he then went from one guy to another, grabbing their arm and begging them to come back to work. He told Lester he was not going to sign anything, adding, ''You know, I have to run my business and if the men don't come back to work, I have to hire replacements.'' All of a sudden, Wood hollered out, ''So, you fired them.'' Mayone Sr. denied saying that.

Mayone went back to his office and made a few calls, two to business men friends. One told him, among other things, to be careful what he says because it can be taken out of context but he could hire replacements. According to Mayone Sr. he received similar advise from a Board agent on a telephone call made then regarding the distinction between firing strikers and replacing them.

Mayone went outside again; Wood was gone, and he told Lester he would not sign. He then called a few of the men to come inside to I talk. They started to follow him but Lester told him to cease, he was representing them, and they were all staying together. On a second approach he then made to Turk an understanding was reached whereby Turk would go home, his van would be brought to him, and he would go to work. Later, Mayone Sr. drove Turk's van to a prearranged location and Turk went to work.

Mayone Sr. denied looking out the window of the main office facing on the sidewalk and street. Neither did he go out to or near the picket line because he ''didn't want no [sic] confrontation.''

On the next morning, May 10, he went out to talk to Rick Sanchez during the picketing but was not successful in inducing his return. Colletti called him in the afternoon, said he was fed up and do not be surprised if I come back to work tomorrow morning. Mayone Sr. replied, ''great,'' and that was the conversation. That evening, Colletti called again to say he was definitely coming back to work. He had talked to Sanchez, he was coming back, possibly Thrush and Wyant. Again, Mayone Sr. said, ''That's great.'' Sanchez called, said he wanted to come back, Mayone Sr. said he was grateful and asked about his roommate Thrush who got on the phone and said he was thinking about doing it. Wyant also called him, and he told him he could also come back. However, Mayone Sr. was preoccupied at the time with his wife's illness with the flu.

On May 11, Colletti came in first, followed by Wyant and then Sanchez. Mayone Sr. was standing outside at the corner of the building. When Macie saw Colletti coming in, Macie approached Mayone Sr. first. He asked for $50 a week more. Mayone Sr. said, ''You just started working for me a month ago,'' and declined. Macie then asked for $25; Mayone Sr. said, ''No,'' and Macie returned to the line.

After Colletti came in, he said he had to go outside for something. He left with Wyant and returned 5 minutes later in a bad mood. Colletti explained that Lester refused to give him back his union card, claiming he did not have it, when it was in his shirt pocket the day before, and he would have to go to or write the union hall for it. Wyant later asked him for time off because he was going through a divorce and was mixed up and Mayone Sr. obliged him with time off to Monday. Sanchez promised his roommate would return the next day.

When Colletti told him at the end of the day his girlfriend was going to type up some forms to get his application back, or withdrawal card, Mayone Sr. told him ''that's up to you.''

Carter called Mayone the evening of May 11 saying, ''I guess the thing fell apart, I'd like to come back to work,'' to which Mayone said, ''Okay.'' He returned Cymbalisty's call that evening also and approved his return on Friday, rather than Thursday. Thrush also called to come back.

Mayone denied telling any employee he had to withdraw from the Union or sign any form taking such action before he could come back to work.

On Thursday, May 12, Micelli, Macie, and Lester were out front. Carter, Racine, and Thrush came to work. Mayone denied Micelli approached him about returning work. However, Mayone Sr. later testified he approached Micelli on May 13

[9] The transcript says, ''next year. . . .'' This is clearly an error in recording or transcription and is ordered corrected.

across the street from the Ravena facility to inform him he had been replaced, to which Micelli replied, ''You mean you fired me.'' Mayone Sr. said he did not say that and Micelli said, ''It's the same thing.'' At this point, Micelli wanted to see him privately; they went to Mayone Sr.'s office where Micelli told him he loved him like a father, Mayone Sr. said, ''You have a strange way of showing it,'' and Micelli then asked for help in getting his unemployment. Mayone agreed, saying if it means telling the truth, he would.

Mayone Sr., as earlier noted, hired two replacements, one on May 11, starting on May 12, and the other on May 12, starting May 13. The first left and was in turn replaced in July.

The following week, in a call from Micelli, Mayone Sr. learned Micelli was having a problem, at unemployment and Mayone Sr. said there may be a mix up with someone else he had fired and he called to straighten it out. Mayone Sr. at first denied any other discussion then, but then recalled telling Micelli to leave the guys alone. He heard Micelli had been approached on the road about trying to get them to go to a meeting again.

Mayone Sr. acknowledged seeing the employee's letters to withdraw their union applications at his lawyer's office. Mayone Sr. did not retain counsel until the Board agent came down to interview employees at the facility on June 9. Mayone Sr. arranged for the release of employees from work to meet the agent but did not select them for this purpose. It was after the interviews that he contacted counsel.

Mayone Sr. testified that as leases for his van started expiring in 1988, he turned them in and purchased new ones starting in early March. By May 9, four leases had expired. On or about April 1, he started telling those drivers, individually, in his office who already had or would be getting their vans replaced, that they would no longer be able to take them home, but he would be working an adjustment to provide a little more money or paid hospitalization at their option. Only Turk, because of his years of service, would be able to continue driving home in a van. Turk was also informed, later, ''right around the strike'' that, in addition, he would be receiving a $20 a week increase. His 20th anniversary and celebration as an employee took place the week following the strike. By the strike, all employees losing their rented vans had been so informed.

Mayone Sr. told the employees he would be making these changes in pay and benefits ''very soon.'' Even for those employees whose vans had already been replaced and who could no longer taken them home, nothing was done immediately to provide them with compensation to make up their additional out of pocket expenses. When he informed them of his plans, the employees affected told him in what form they wanted the benefit, whether in cash or increased hospitalization. In a number of cases, perhaps most, no specific amount was discussed or specified by Mayone Sr. Mayone Sr., here, testified in conflict with his earlier testimony while a General Counsel's witness that with respect to the van leases terminated prior to the strike, the drivers of new vans were not then prohibited from taking them home. Mayone Sr. now swore this portion of his policy was immediately implemented before the strike. Later, Mayone Sr. contradicted himself again by swearing that the policy was only implemented when all the vans remained on site at the beginning of the strike. ''That's when that started, and they knew they couldn't take it home. One by one I was telling them, you know, what I spoke to you earlier about last month or I'm going to institute it now.'' (Tr. 877.) He delayed and procrastinated implementing the policy, even though losing money, until the presence of old vans on site woke him up.

On Friday, May 13, Mayone Sr. testified, he informed the employees who had returned to work that their benefit would be forthcoming starting then. The particular benefits provided each employee and the circumstances surrounding their receipt have been earlier summarized. A number of employees testified in conflict with Mayone Sr. about learning of their benefits on their return to work before Friday. On cross-examination, Mayone Sr. now explained that whenever they came back to work he told them you cannot take the van home and asked them what is your choice [of benefit]. Mayone Sr. then contradicted not only his earlier testimony about Friday as being the date of his conversations but also his earlier testimony that he had gone over the options and gotten employee selections before the strike. This testimony is also in conflict with that of Colletti who swore to an understanding that in the days immediately preceding the Union's April 27 meeting, he received an assurance of a $25 increase within one or two weeks. See, supra. Mayone Sr. also denied he had any prior conversations about increased benefits with Micelli, who, like Colletti did not take a van home.

During his cross-examination, Mayone Sr. now admitted asking employees gathered together early on May 9 ''Why can't you come in? We can talk about this.'' Mayone Sr. also now testified that on May 9 he called Macie's mother while Macie was picketing and told her he would really like to have Jim back to work, could she talk him into coming back. Macie lived with his mother. She told Mayone Sr. it was entirely up to her son. Mayone Sr. added under prodding that Mrs. Macie told him that her son was under the impression when he, Mayone Sr., had taken him to Marshall's garage to help him purchase a car, that Mayone Sr. would cosign a loan. Astoundingly, Mayone Sr. denied introducing this subject of his taking Macie to a close salesman friend at the garage and used car dealer, but it was something which had motivated his call. He believed his help in getting Macie the car deal called for reciprocation by Macie in ceasing his participation in the strike and picketing and returning to work.

During the Union's cross-examination, Mayone Sr. admitted telling the Board agent on his June visit to the facility that he never directly or impliedly told any employee he would improve wages or benefits if they returned to work. However, he did tell them the following week he had decided he did not want them to take their vans home at night as in the past. Mayone Sr.'s failure to mention the portion of his new policy reflecting an adjustment of wages or benefits in this conversation is a significant omission. In another oral statement made to the Board agent, significantly, Mayone Sr. failed to mention the preliminary meeting and verbal exchange with Jeff Dowd, about which he earlier testified before walking over to the assembled group of his employers early on May 9 and which conversation in full I have not credited.

I have earlier credited General Counsel's witnesses Micelli, Macie, Wood, Lester, and Carter in certain respects. I noted, in doing so, that these credibility resolutions were

grounded, in part, on my evaluation of the credibility of Respondent's witnesses.

The foregoing summaries of their testimony provides strong basis for discrediting the employees and the two Mayones who testified on behalf of Respondent, in so far as their testimony departs substantially from the testimony of the Government's witnesses. Initially, it must be noted that of the four employees called by Respondent, three of them, Wyant, Cymbalisty, and Colletti, denied overhearing any of the remarks, including threats to discharge and related comments, made by Mayone Sr. on May 9 and Colletti, in particular, admitted not being present when Mayone Jr. spoke. Wyant could not hear Mayone Sr.; Cymbalisty did not hear Mayone Sr. because of his distance from the group around Mayone Sr. and Lester, and Colletti did not hear Mayone Sr. address Lester or employees generally. Thus none of these three denied the statements attributed to Mayone Sr. by the employees and organizers who earlier testified.

Sanchez made some major changes in his recitals which made his testimony particularly unreliable. After first admitting Mayone Sr. made clear the futility of employee selection of the Union as bargaining agent, Sanchez changed his testimony twice after apparently realizing the significance of his initial admission. I credit his initial response. Sanchez' testimony was further impeached by the statement in his affidavit in which he denied Mayone Sr. told the employees what would happen if they did not return to work in contrast to his testimony at the hearing that Mayone Sr. told the employees they would be replaced if they struck. Based on these, among other inconsistent statements, including those in which Sanchez disputed Mayone Sr. that he took papers from Lester, I do not credit Sanchez' denials that the Mayones threatened to fire the assembled employees and that the Mayones did not require the employees to withdraw from the Union before he would take them back. I do credit Sanchez' admissions, including the statement he possible made to Lester that he would be receiving a raise if he crossed the picket line and went in to work.

Wyant proved unreliable in first denying and then admitting that he had been solicited to return to work. Wyant's characterization of Mayone Sr.'s demeanor as calm while in the parking lot is at variance with Sanchez, Cymbalisty, and Mayone Sr.'s own testimony regarding his pleading and begging manner at the time. His testimony is also discredited with respect to his denials that Respondent required him to get his union card back to return to his job. Cymbalisty was admittedly confused in his testimony and repeatedly evidenced this state while on the witness stand. His denials of Mayone Sr.'s threatening statements on May 9 and of any request by Mayone Sr. during their telephone conversation to get his union card back are not credited. Cymbalisty's testimony relating the circumstances of his receipt of increased insurance coverage without cost on his return to work on May 13 when he was still driving home a leased van is disingenuous at best and his recollection of having assumed from his talk with Wyant that Mayone Sr. would welcome him back shields more than it reveals about the true circumstances of Respondent's promise and grant of benefit and requirement that he disavow the Union as the price for his return.

Colletti's explanation for his having left the facility on May 11 to seek the return of his union card is not believable. A person of Colletti's professed convictions and prior conduct that week would have independently taken steps to disavow the Union before entering the facility. The only intervening event after Colletti went into the office was his meeting with Mayone Sr. shortly after Mayone Sr. had told Micelli he could not return without his card. In view of Carter's admission, it is evident that Mayone Sr. had surely earlier made Colletti aware of Respondent's interest in having the employees' withdraw from union affiliation. Neither is Colletti credited that Mayone Sr.'s request for the production of his affidavit was voluntary.

It is also highly significant that Mayone Sr. did not corroborate Colletti that he had been informed in late April he would be receiving a $25 increase in 1 or 2 weeks. Colletti was not among the group of employees who drove vans home—the only group for which Mayone Sr. testified he planned increases. There was no evidence of any general Respondent plan of salary review or adjustment overtime. Thus, Colletti, as well as Cymbalisty and Carter, fell outside the scope of Respondent's defense that it was merely rewarding employees whose costs had increased on the return of their leased vans when it increased their wages or provided a health benefit on their return from striking. Colletti also contradicted himself as to when he started using the title of sales manager based on the job description he provided on his union card. Colletti's self-aggrandizement regarding his job function is consistent with his role in leading the return from work on Respondent's terms—of disavowing the union and being rewarded with the benefit Mayone Sr. had promised but had not fulfilled for certain van drivers. Colletti's immediate reward was the $25 a week increase made effective the day of his return on a pro rata basis which, in his case, was not provided to make up for additional out of pocket expenses as was the case with some of his colleagues.

Mayone Jr. suffered a convenient loss of memory while on the witness stand. He made a number of significant changes in his testimony and between his testimony and oral statements he affirmed making to a Board agent prior to trial. One of the most significant omissions from his prior oral statement was his failure to mention receiving a warning from Dowd before he spoke to the employees on May 9. There is no other evidence of this conversation and I do not credit Mayone Jr.'s testimony in this regard. Nor do I credit his denial of cursing and threatening employees with firing or loss of their jobs; nor his denial of playing any role in requiring the Union's disavowal by employees seeking return to work.

It is clear from, Mayone Jr.'s testimony that Respondent was aware that Macie and Micelli were the leading union advocates. These two employees received the brunt of Respondent's antiunion conduct. In particular, Mayone Sr. recognized Macie's union activities in later conversations as well as when he directed him to cease contacting employees about the Union after the picketing ceased and the strike had failed—a clear violation of the Act.

Mayone Sr.'s admitted behavior on May 9 and thereafter lends credence to the credited testimony of those witnesses who heard him threaten employees, and then cajole them to return with promises of improvements in pay, benefits, and access. It is also incredible that Mayone Sr. would limit his gratitude for the employees' interest in returning to work, to expressing thanks. Sanchez strongly suggested at what he be-

lieved was waiting for him across the picket line and others, such ag Cymbalisty, similarly took their health or wage improvement as a quid pro quo for their support of Respondent in the face of the Union's demands and picketing. Mayone Sr.'s denials of threats, promises, interrogations, and grants of various benefits as rewards, are not credited. Whether or not he was made aware of the limits of proper or lawful conduct by Dowd before approaching the employees, and I have found he was not, it is clear that Mayone Sr.'s perception of a significant and immediate threat to the very survival of his business by the actions of the Union drove this volatile and emotional personality to far exceed the legal constraints set forth in the Act.

It is not believable that Mayone Sr. did not seek to draw pickets inside on the first day, as he swore. Mayone Sr.'s explanation, that he did not want a confrontation, is undermined by his conduct on his two appearances earlier that day in the parking lot when he exposed himself to Union and employee criticism and censure by simultaneously grabbing aside employees and refusing to respond to the Union's demands.

No employee except Colletti backed up Mayone Sr.'s assertion of prior promises of specific wage increases or health benefits and Colletti's testimony is at variance with Mayone Sr.'s policy of rewarding only employees hurt by his new van policy.

Analysis and Conclusions

Based on the credibility resolutions I have made, as well as the admissions made by Respondent's witnesses, including the two Mayones, the facts show that once the Union made itself known and sought to bargain that Respondent embarked on a course of conduct designed with one aim in mind, to destroy the Union's majority and to destroy the Union as a viable agent for negotiating the terms and conditions of employment of its unit employees.

The complaint, as amended at hearing, alleges that the Union enjoyed majority status among Respondent's route salesmen, drivers, mechanics, cashiers, warehousemen, and utility men employed at its facilities in Ravena and Coeymans, New York, when it demanded bargaining for these employees on May 9. It also alleges that this unit constitutes an appropriate unit under the Act. The parties stipulated that an appropriate unit at Respondent's places of business include drivers/servicemen, vending machine mechanics, and plant clerical employees. The parties differ as to the inclusion of the secretary/bookkeepers, Respondent urging their inclusion as plant clerical. As to the cashier, utility/maintenance man, and Grant Lewis, sales manager, again Respondent urges that these positions are included in the appropriate unit.

No cashier was employed on the date of the demand. Nonetheless, I will determine the unit placement of that position since it was a job title included in the Union's claim of majority representation and demand for bargaining which I find was submitted to, and received by both Mayones, on May 9. Lester reasonably explained why he included that title in his demand. It was because the then cashier informed him he also drove a route on a daily basis. No such activity has been claimed for the successor cashier who performs his services in an isolated room without contact with the drivers or mechanics. I will exclude the cashier position as lacking a community of interest with the driver-salesmen and mechanic. See *Armco, Inc*., 271 NLRB 350, 351 (1984), for a statement of the principles governing unit composition. As to the utility man, unlike the driver, product, and route related functions performed by individuals with this title in other companies with whom the Union has bargaining relations, Giacomini performs no such functions for Respondent. The functions performed by Giacomini do not bring him in physical or work contact with any of the other unit personnel. He works part time on an hourly rate significantly different from the drivers, and I conclude the utility or maintenance version is also properly excluded from the appropriate unit as stipulated. The facts also more than justify a conclusion that Grant Lewis is a supervisor within the meaning of the Act, and I so conclude.

As earlier noted, no separate warehousemen were employed on the significant dates, or even to close of hearing. Their functions however were performed by the drivers. I also conclude that the secretary/bookkeepers are not plant clerical employees and are therefore to be excluded from the unit as stipulated and sought by the Union. While these bookkeepers have daily contact with drivers and may be appropriately included in an overall unit if one were sought, but see *Merry Oldsmobile*, 287 NLRB 847 (1987), it is clear that the Union excluded then, from, its demand, the Respondent does not dispute their exclusion if found to be office clerical employees as I conclude they are, and they are not part of an appropriate unit sought here. The Act does not compel the selection of the most appropriate unit. *Hamilton Test Systems New York*, 265 NLRB 595, 596 (1982).

Inasmuch as the Union held an overwhelming majority among the Respondent's route salesmen, drivers, mechanics, and warehousemen, the unit I find is appropriate, was stipulated as appropriate, and which the Union sought to represent, I conclude it represented these employees when it demanded recognition and bargaining on May 9. Even if the utility person is included, the Union's majority position is not significantly diminished. Putting aside the Union's misunderstanding of the function of the cashier and utility man, I also conclude that the minor variance in this case, if there was one, between the Union's demand and the actual job classifications of the positions which it represented, was so negligible as to constitute no defense to the Union's demand for recogn ition and bargaining in the appropriate unit. See *Color Tech Corp*., 286 NLRB 476 (1987).

The Company's response was to reject the offer of a third party card check, to refuse recognition outright and, indeed, to announce its rejection of the collective-bargaining principle with any union so long as Respondent remained in business. Its position was taken in the face of near unanimity among the unit personnel, with only Wilkins and Dowd not present or participating in the concerted withholding of their labor at 7:30 a.m. on May 9.[10] At no time did Respondent seriously dispute the Union's majority status among the unit employees.

[10] While the Union's letter sought a separate unit for each Respondent entity, Lester's demand was made on behalf of all the employees of the single, integrated employer and the Mayones knew what the Union meant and did not dispute it. I conclude that the overall, alternate unit alleged by the General Counsel was acknowledged by the parties and will better serve the public interest and the employees' interest as being the unit which governs the Respondent's obligations in this case.

Instead of leaving the matter there, Respondent's managers, in the person of the Mayones, Jr. and Sr., immediately threatened to fire those who refused to come to work and continued their concerted demand for recognition of their agent and for bargaining of the terms and conditions of their employment. Mayone Sr., in particular, engaged in a series of promises and enticements to the same end. Each of the allegations contained in paragraph VI of the consolidated complaint, as amended at hearing, has been proven by the General Counsel. Mayone Sr. (as well as Jr.) informed the employees that Respondent would never recognize or deal with the Union and that the Union will do more harm than good; both Mayones interrogated their employees concerning the reasons for their union involvement on the dates alleged; invited the striking employees into the office to talk, and solicited grievances, and having received them, promised to redress them; Mayone Sr. promised to make a car loan for an employee, Mark Racene; Mayone Sr. required employees to withdraw from and disavow the Union before they would be permitted to return to work, *Parkview Gardens Care Center*, 280 NLRB 47 (1986); and both Mayones discharged the employees for continuing, in the face of their threat to discharge them, their concerted refusal to work on May 9. The threats to discharge were unlawful, *Conair Corp*., 261 NLRB 1189 (1982); *Emerson Electric Co*., 287 NLRB 1065 (1988). So too were the discharges which became effective when the employees refused to return to work the morning of May 9. There is no question but that the Mayones' statements that morning would reasonably lead the drivers to believe they had been discharged. All of them, except possibly Turk, first sought leave to return to work from their terminated state. See *Rapid Armored Truck Corp*., 281 NLRB 371 (1986); *NLRB v. U.S. Cold Storage Corp*., 203 F.2d 924, (5th Cir. 1953). See also *Abilities & Goodwill*, 241 NLRB 27 (1979), where the Board held that discriminatorily discharged strikers are to be treated no differently than other unlawful discharges, and, accordingly, are entitled to reinstatement and backpay from the date of the employer's unlawful action.

Respondent in its brief questions whether it was likely that an employer would both discharge, and promise or improve terms and conditions of employment of, the same employees. The answer here was clearly yes. The Mayones used both the carrot and the stick. The stick was imposed early, and when it initially proved ineffective, that is to say, when no employees broke ranks on learning they were fired for continuing to remain in the parking lot, Mayone Sr. emphasized other tactics. Even as the Union was waiting for the reply to its demand for collective bargaining, Respondent made direct approaches to bargain individually, and sought to make deals based on individual employee concerns and grievances. This unlawful approach proved the more effective.

When employees believed that the Company meant what it said and it would never deal with the Union, and would refuse to employ those who insisted on continued exercise of their Section 7 rights—a number of witnesses, among them Sanchez and Colletti make this point most effectively—even before the second day of striking and picketing was completed, the employees' resolve had crumbled and Mayone Sr. was ready to couple again the carrot and the stick. He held out the wage increases and health plan premium payments which he had previously generally discussed as now being available to those who crossed the picket line, but only on the condition that the union application be withdrawn. That way, in Mayone Sr.'s view, without benefit of counsel, he would be ridding the Company of any possible claim of continued union representation or interest in his employees, and satisfying the major employee grievance, whether stated or not, that he had failed to fulfill his earlier indefinite promises of ''soon'' providing salary or benefit improvements. As to the condition imposed for their return, the fact that Colletti was the individual who had prepared and circulated the form withdrawals of the employees' union applications is no defense to the allegation of violation since the taint to Colletti's activity arises from the evidence of establishment of an employer strategy, shown directly in Carter's testimony and inferable from the credited testimony of other employees. Colletti thus acted in this regard as an agent of Respondent in securing the union resignations which Mayone Sr. required.

That these increases, all conveniently made effective on the employees' return to work, were rewards for the loyalty shown of abandoning the Union is abundantly clear. Sanchez' testimony on this matter is directly to the point. As noted, Mayone Sr.'s explanation for granting the benefits when all the vans were on the premises is unconvincing, particularly when Mayone Sr. could not justify the improvements granted Carter, Colletti, and Cymbalisty as having any relationship to the loss of a van or increased out of pocket expenses. Similarly, the greater openness Mayone Sr. showed employees in communicating with them about their status, salaries or work related concerns immediately after their return to work, was a benefit directly related to the unlawful interrogations and promises in which Mayone Sr. had engaged during the strike and picketing.

Mayone Sr.'s conduct toward Micelli and Macie, the two known union ringleaders, is particularly revealing as to Mayone Sr.'s true, unlawful motivations in discharging his employees, in granting them benefits, insisting on their withdrawals from union affiliation and in refusing to recognize or bargain with the Union. Micelli had already been fired along with the others, when on May 11 he was told first without any foundation, that he had been replaced and then that he could take Respondent's refusal to allow him to return anyway he wanted (including as a firing). Mayone Sr.'s later direction to Micelli to cease contact with employees regarding the Union and his harassment of Micelli to get him to produce his affidavit for Respondent's use, are clear violations of the Act. Respondent's directions to other employees to produce their affidavits, while not as extreme in their coercive nature as that directed to Micelli, were likewise unlawful by virtue of Mayone's failure to provide any of them the safeguards dictated by *Johnnie's Poultry Co*., 146 NLRB 770, 775 (1964), including the failure to assure them that no reprisals would be taken for their refusal or failure to comply and that the requests were voluntary in nature.

Macie was not taken back at the time other employees returned when he rejected Mayone Sr.'s unlawful condition of union disavowal, and was not offered reinstatement until more than a month later. Surely another factor in this delay was Mayone Sr.'s failure to obtain cooperation from Macie's mother in getting her son to come back to work in return for his help in Macie's purchase of an automobile.

The complaint alleges and I also conclude that the strike was prolonged by Respondent's unfair later practices, *C-Line*

Express, 292 NLRB 638 (1989), thus converting the strike for recognition into an unfair labor practice strike. *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1087 (1985); *Vulcan-Hart Corp.*, 262 NLRB 167, 168 (1982). The testimony of Micelli and Macie as to what motivated their striking and picketing after the events of the early morning of May 9 is instructive in this regard.

D. *Bargaining Order*

I have previously found that the Union represented 10 of the 12 unit employees when it demanded bargaining on May 9. The Union's designation by these employees was evidenced by signed cards authorizing the Union to represent them for purposes of collective bargaining. The designation of the Union was further supported and evidenced by the employees' presence in a group in Respondent's parking lot early on the morning of May 9 when the union agents Lester and Wood demanded bargaining and the employees refused to break solidarity or return to work, struck for recognition and, with the exception of Turk, commenced picketing in support of the demand.

The complaint alleges that the Respondent's conduct in this case was such that it warrants the issuance of a bargaining order. The test for determining whether a bargaining order should issue here has been expressed by the Supreme Court as one requiring an examination as to whether ''the possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and . . . employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order.'' *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614–615 (1969). In determining whether to use this remedy, the Court noted that the Board may properly consider ''the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future.'' Id. at 614–615. See also *Arkansas Lighthouse for the Blind*, 284 NLRB 1214 (1987).

I conclude that the Respondent's unfair labor practices were so pervasive, immediate, and massive as to preclude the possibility that an election could fairly reflect the unfettered sentiments of the employees, even with an extensive passage of time since the conduct engaged in here. The employees cannot fail to recall the immediate smashing of their collective effort at fairer treatment and minimal improvements in their wages and health care coverage. Nor can they dismiss the degree to which Respondent acted on their fears and concerns to undermine their joint enterprise by firing them, vowing never to deal with their union, and then cajoling, offering benefits, and permitting their return to work and delivering on those promises, but only at the price of their rejection in writing of their bargaining agent. Furthermore, there is every reason to believe that Respondents' misconduct is likely to recur. Thus, Mayone Sr. took after Micelli,—a known ringleader,—at every opportunity well after the employees' union drive had been defeated to make sure he avoided union agents, and refrained from any attempts to resurrect the union movement among his cohorts. Mayone Sr.'s subsequent unlawful conduct in soliciting evidence for the trial of this matter shows that Mayone Sr. many months after most of the events involved herein had transpired, was fixed in his continued hostility and animosity to accepting the principle of collective bargaining. Mayone Sr.'s vow that as long as he owned the business ''there ain't going to be no God dammed union here'' is the strongest possible proof of what Respondent's position is likely to be were an election found to be the preferred means of determining employee majority sentiment rather than the cards they each signed before the Respondent's illegal onslaught.

In sum, the coercive impact of Respondents' conduct has not dissipated[11] and with a strong likelihood of its recurring, anything less than the imposition of a bargaining order on the facts presented ''would, in effect, reward the Respondent[s] for [their] own wrongdoing.'' *Kona 60 Minute Photo*, 277 NLRB 867, 870 (1985). See also *Bakers of Paris*, 288 NLRB 991 (1988); *Fimco, Inc.*, 282 NLRB 653 (1987); and *Color Tech Corp.*, 286 NLRB 476 (1987), where bargaining orders issued to remedy conduct similar to the allegations made and proven in the instant proceeding. Neither should the passage of time, ''regrettable'' as it may be, constitute a sufficient basis for denying a bargaining order here. *Quality Aluminum Products*, 278 NLRB 338 (1988), enfd. 813 F.2d 795 (6th Cir. 1987). Accord: *Exchange Bank v. NLRB*, 732 F.2d 60, 63–64 (6th Cir. 1984); *NLRB v. Pacific Southwest Airlines*, 550 F.2d 1148, 1152–1153 (9th Cir. 1977); *Dayton Auto Electric*, 278 NLRB 551 (1986).

CONCLUSIONS OF LAW

1. Respondents Fun Connection and Juice Time; Offi-Serve, Div. of Stuff Like That, Inc.; and Capitol Vending and Columbia Vendors, collectively called Respondent, are each employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Bakery, Laundry, Beverage Drivers and Vending Machine Servicemen and Allied Workers Local No. 669, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By informing their employees that they would never recognize or deal with a union, and that they were discharged for engaging in union or other protected concerted activities, by interrogating their employees concerning their union and/or protected concerted activities, by soliciting grievances from their employees and impliedly and explicitly promising to redress them and institute improvements in

[11] Respondent submits that a letter it sent to all employees on June 14, 1988, constitutes a ''rectifying measure'' curing whatever coercive effects there were from its conduct, assuming it to be found unlawful. Rather than remedying its conduct, the letter compounds the coercive nature of its conduct by alluding to the Teamster Local 669 use of ''muscle'' by calling a strike-found herein to have been called after the unlawful discharge of the employees, other unlawful acts, and bad faith refusal to bargain had commenced. The reference to hiring of replacement to continue its business is also a misstatement of the facts as found herein. The subsequent recital of the alleged rights of the employees under the Act cannot shield Respondent from the consequences of its prior, subsequent, and continuing unfair labor practices. Neither does the Respondent's unlawful conduct subsequent to this letter within a month after the events nor the Mayones' nor the employees' prevarications and lies on the witness stand provide any assurance that the purported promises contained in this letter had any meaning for either of then. In short, the purported repudiation does not admit wrongdoing, was untimely, was not free from its other and continuing illegal conduct for which it failed to provide a make whole remedy, and was premised on a series of untruths. See *Scott & Fetzer Co.*, 228 NLRB 1016 (1977), and cases cited at 1024. See also *Pope Maintenance Corp.*, 228 NLRB 326, 340 (1977), and *Ambulette Transportation Service*, 287 NLRB 224 (1988).

terms and conditions of employment, and to provide other benefits including cosigning for an automobile loan if employees ceased their support for the Union, by instituting as a condition of employment a requirement that employees sign a statement disavowing the Union and withdrawing their union authorization cards, by directing their employees to produce their NLRB affidavits in the course of preparation for trial, without the specific safeguards required by the Act, and by directing an employee to abstain from contact with the Union or with other employees, in order to solicit their support for the Union, Respondents have restrained and coerced their employees in the exercise of the rights guaranteed by Section 7 of the Act and have thereby engaged in and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By rescinding their practice of permitting employees to bring Respondents' vans to their homes at night and, at the same time, instituting, at the option of their employees, a weekly salary increase or a like increase in Respondents' contribution to health insurance premiums, or other improvements in terms and conditions to employment, in order to discourage their employees' support for and activities on behalf of the Union, Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. The employees of Respondents who ceased work concertedly and went on strike on May 9, 1990, were engaged in a protected concerted activity within the meaning of Section 7 of the Act.

6. By terminating the employment of their employees Mark Racene, Steve Colletti, Rick Thrush, Robert Wyant, James Macie, Kenneth Cymbalisty, Harold Turk, Rick Sanchez, Joseph Micelli, and Malcolm Carter on May 9, 1988, because they ceased work concertedly and engaged in the strike described in paragraph 5, above, Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

7. All route salesmen, drivers, mechanics, and warehousemen employed by Respondents at their facilities located at Ravina and Coeymans, New York, excluding all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

8. Beginning or or about May 8, 1988, the Union represented a majority of the employees in the above-described appropriate unit, and has been, and is, the exclusive representative of all the employees for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

9. By refusing to recognize and bargain with the Union with respect to the employees in the appropriate unit described above on and after May 9, 1988, the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

10. By engaging in the conduct described in paragraphs 3, 4, 6, and 9, above, Respondents prolonged the strike described in paragraph 5 above and converted the economic strike into an unfair labor practice strike.

11. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I find it necessary to order Respondents to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondents having discriminatorily discharged certain of their employees, I find it necessary to order them to compensate these employees for any loss of earnings or other monetary losses they may have suffered as a result of the discriminations against them, less interim earnings, if any, with interest thereon as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),[12] for the period from their unlawful discharges, on May 9, 1988, to the date they were each offered reinstatement. Any questions regarding the availability for employment of strikers Micell and Macie during the backpay period is reserved for the compliance stage of this proceeding. See *Abilities & Goodwill*, 241 NLRB 27, 28–29. Each of the discharged strikers having either been reinstated or offered reinstatement by Respondents, I deem it unnecessary to order them to offer reinstatement to any of them. Inasmuch as Respondents have engaged in misconduct of such a widespread and pervasive nature so as to demonstrate a general disregard for the employees' fundamental rights, I find it necessary to issue a bargaining order and a broad order, requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act.

[Recommended Order omitted from publication.]

[12] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Sec. 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).